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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ASSOCIATED INDUSTRIES OF FLORIDA, INC. and PHILIP MORRIS, INC.,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AND STATE OF FLORIDA,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a State seeks to recover Medicaid expenditures paid to treat injured residents from those allegedly liable for such injuries, may the State, consistent with due process, confer upon itself a unique cause of action that directs courts to abrogate common law and equitable principles, including affirmative defenses, "to the extent necessary to ensure full recovery [by the State]?"

RULE 14.1(b) PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Appellants, Cross-Appellees

- State of Florida
- Agency for Health Care Administration
- State of Florida Department of Business and Professional Regulation

Appellees, Cross-Appellants

- Associated Industries of Florida, Inc.
- Publix Supermarkets, Inc.
- National Association of Convenience Stores, Inc.
- Philip Morris, Inc.

RULE 29.6 LISTING OF PHILIP MORRIS, INC. PARENT COMPANY AND SUBSIDIARIES

Parent Company

- Philip Morris Companies, Inc.

Philip Morris Inc. Subsidiaries

- Carolina Properties of Greenville Inc.
- Colonial Heights Packaging, Inc.
- Packaged Food & Beverage Co., Inc. and Subsidiaries
  - —Bennett, Farr & Wells Bottling Company
  - —Mitchell Citrus Products, Inc.
  - —PFB Realty Corporation
  - —Taylor Group, Inc.
- Philip Morris Overseas Limited

RULE 29.6 LISTING OF ASSOCIATED INDUSTRIES OF FLORIDA, INC. PARENT COMPANY AND SUBSIDIARIES

Parent Company

- None

(Nonwholly Owned) Subsidiaries

- None

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PETITION FOR A WRIT OF CERTIORARI

Associated Industries of Florida, Inc. ("Associated Industries") and Philip Morris, Inc. ("Philip Morris"), by their undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS OF OTHER COURTS

The Supreme Court of Florida entered an opinion and final judgment (App. 1a-43a) affirming in part and reversing in part the opinion and judgment of the Circuit Court of Leon County. (App. 44a-46a). The opinion of the Supreme Court of Florida is reported at 678 So.2d 1239. By separate order, the Supreme Court of Florida denied a petition for rehearing. (App. 49a).

JURISDICTION

The final judgment of the Supreme Court of Florida in this action for declaratory relief was entered on June 27, 1996 and petitioners' Motion for Rehearing was denied on September 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONSTITUTION, AMENDMENT XIV

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

This case concerns the constitutionality of the 1994 Amendments to the Florida Medicaid Third-Party Liability Act (the "Act"). The provision most applicable to this petition is Fla. Stat. Ann. § 409.910(1) (West 1996), which provides:[1]

> It is the intent of the Legislature that Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are available, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to

[1] The full text of the Act is included as Appendix D to this petition.

the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. *Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources*: such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources. Common law theories of recovery shall be liberally construed to accomplish this intent.

STATEMENT

The Florida Supreme Court (by a 4-3 margin) decided that the Florida Legislature did not violate due process when it directed its courts to ignore (or "abrogate") legal and equitable rules, including affirmative defenses, "to the extent necessary to ensure full recovery" of Medicaid expenses from "liable" third parties. The constitutionality of the statute's abrogation of affirmative defenses is of particular significance, since the only preexisting "liability" of third parties turned on whether they violated duties owed to the injured Medicaid recipients.

I. BACKGROUND OF THE MEDICAID PROGRAM

Medicaid is a joint federal-state program financed primarily by the federal government. Participating states, such as the State of Florida, contribute additional funds, albeit far less than the federal government. The general purpose of the program is to provide payments for medical assistance for persons who satisfy the designated requirements (mostly income and needs related). No state

is required to participate in the Medicaid program. Those that do voluntarily participate must abide by federal requirements, one of which requires participating states to seek reimbursement for Medicaid expenditures from appropriate third parties. *See* 42 U.S.C. § 1396a(a)(25) (1994); 42 C.F.R. §§ 430.10, 433.135-154 (1995). In particular, federal law requires participating states to obtain assignment of all claims from recipients and pursue recovery from third parties by the traditional methods of subrogation and assignment. *See* 42 C.F.R. §§ 433.137(a), 433.145-46(a) (1995). Thus, federal law contemplates that a state seeking recovery of Medicaid expenditures will simply stand in the shoes of the Medicaid recipient.

II. THE FLORIDA MEDICAID THIRD-PARTY LIABILITY ACT

Pursuant to the federal requirement, the Florida Medicaid Third-Party Liability Act (the "Act") was enacted in 1978 and authorizes the State, acting through the Florida Agency for Health Care Administration ("AHCA"), to pursue recovery of Medicaid health care costs from third parties. 1978 Fla. Laws ch. 78-433, § 14. As originally enacted, the Act limited the State's remedies to the traditional subrogation or assignment action envisioned by federal law: AHCA (as assignee) simply stepped into the shoes of Medicaid recipients. Fla. Stat. Ann. § 409.266(3) (Supp. 1978). Thus, the State could obtain reimbursement from a third party for Medicaid payments if, but only if, the recipient had a right to recover from that party.[2]

A. Passage of the Amendments

The Act was substantially modified by major amendments (the "Amendments") in 1994. These Amendments

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[2] In 1990, the original subrogation provision was repealed, 1990 Fla. Laws ch. 90-295, § 34, and a new section was enacted in its place. *Id.* at § 33 (codified as amended at Fla. Stat. Ann. § 409.910). Like the federal Medicaid statute and the 1978 Act, the 1990 Act contemplated that the State's sole means of recovery against third parties would be by subrogation or assignment.

were passed as a result of a deviation from the normal legislative process during the last hours of the legislative session. Last-minute changes were slipped unannounced into an innocuous bill previously designed simply to transfer responsibility for the Medicaid fraud-control program to the Office of the Attorney General. The surreptitious changes were reportedly engineered by a group of plaintiffs' lawyers. *See* "Florida Bill Seeks to Recover State's Cost of Treating Smoking-Related Illness," Wall St. J., May 3, 1994, at A-5, 1994 WL-WSJ 294625 ("WSJ Art."). Unbeknownst to most of the Legislature, the proposed bill was thus revamped to make sweeping changes to Florida law, which are described below. The revised text was never read on the Senate floor, and the Amendments were approved by the Legislature without debate or discussion about the last minute changes.[3] After learning of the substance of what it had enacted, the Legislature overwhelmingly voted to repeal the Amendments at the beginning of its 1995 session.[4] However, the Governor vetoed the repeal.

B. Description of the Amendments

The Amendments worked a monumental change in preexisting State law. As noted, before passage of the Amendments, AHCA could pursue only traditional subrogation and assignment actions on behalf of the State. The Amendments, however, created a new "cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid." Fla. Stat. Ann. § 409.910(6)(a) (West 1996). The State's new cause of action is against "liable" third parties, and such "liabil-

[3] *See, e.g.*, Fla. S., tape recording of proceedings (April 7, 1994) (transcribed discussion is attached as Appendix 9 to Appellees' Answer and Cross-Appeal Brief before the Supreme Court of Florida ("Fla. Br.")); Fla. H.R., tape recording of proceedings (April 8, 1994) (transcribed discussion is attached as Appendix 10 to Fla. Br.).

[4] S.B. 42, 1995 Reg. Sess (Appendix 11 to Fla. Br.).

ity" for past injuries can arise only from duties owed to (and injuries sustained by) individual Medicaid recipients. The statute nonetheless declared the new cause of action to be "independent of any rights or causes of action of the recipient." *Id.* Under the 4-3 decision below, the State may now obtain third-party reimbursement of Medicaid expenses for treatment of injured recipients even when the third parties are not liable to the recipients.[5]

To weigh the scales decisively in favor of recovery by the State, the Amendments adopted a series of rules that severely limit a defendant's ability to defend against a state reimbursement lawsuit. The Amendments included:

- *Abrogation of Affirmative Defenses Only in Cases Brought by the State.* "Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources." Fla. Stat. Ann. § 409.910(1).
- *Liberal Construction of Common Law.* "Common law theories of recovery shall be liberally construed" to accomplish the "intent" of the Act (*i.e.*, that "if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources"). *Id.* § 409.910(1).[6]

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[5] Subsequent to the Amendments, Governor Lawton Chiles ordered the appropriate executive branch officials to pursue the recovery of Medicaid expenditures only against the tobacco industry (and illegal drugs). Fla. Exec. Order No. 95-109 (Mar. 28, 1995) (App. 70a-72a). As noted below, this order was later held invalid, although the State has not initiated claims against any industry other than the tobacco industry.

[6] The Amendments provided that the State may bring a single, omnibus proceeding to recover from multiple third parties with

III. THE STATE TRIAL COURT PROCEEDINGS

On June 30, 1994, Associated Industries (an organization representing numerous businesses conducting business in the State of Florida), Philip Morris, Publix Supermarkets, Inc. and the National Association of Convenience Stores filed a lawsuit in State court seeking a declaration that the 1994 Amendments were unconstitutional under both the Florida and federal constitutions.[7] Count V of the Complaint alleged that the Act violated "due process guarantees against excessive and arbitrary liability." (R. 321).[8] The Complaint alleged that the Act was intended "to 'stack the deck' against the tobacco companies in future litigation brought by the State" (Complt. ¶ 16) (R. 6); that it "was drafted to eliminate the traditional common law defenses that have been successfully asserted in such product liability litigation" (*Id.* ¶ 18) (R. 6); and that the State had exempted itself from "fundamental tort defenses of Florida law available to defendants in all other tort actions." (*Id.* ¶ 28) (R. 10). The Complaint further noted that the chief legislative draftsman of the Act told the press: ' 'They're going to have to come to court, and no more of these stupid little defenses.' " (*Id.* ¶ 16) (R. 6); *see also* WSJ Art. at A-5. It noted the reaction of AHCA's general counsel to the bill: "It's like

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respect to multiple recipients if there are "common issues of fact or law." *Id.* § 409.910(9). In such actions, the evidence code was to be "liberally construed," *id.* § 409.910(9), and the State was not even required to identify the individual recipients for whom payment has been made (and with respect to which reimbursement is sought) if such identification was "impracticable." *Id.* § 409.910 (9)(a).

[7] On February 21, 1995, the State filed a claim against Philip Morris, various other tobacco manufacturers, and others associated with the tobacco industry seeking reimbursement for Medicaid expenditures under the Act. That case is set for trial in August 1997.

[8] References to "R. ——" refer to the record on appeal before the Florida Supreme Court.

counting the days 'til Christmas." (Complt. ¶ 25) (R. 9); *see also* WSJ Art. at A-5.

On June 26, 1995, the Circuit Court entered final judgment in the case. (App. 44a-46a). The Final Order was based on the agreement of all parties that there was no disputed issue of material fact and that the action was ripe for final adjudication. *Id.* The Circuit Court ruled for plaintiffs on some issues but, without elaboration, rejected the claim that the Amendments violated the federal constitution.[9] The State appealed from certain aspects of the decision on July 17, 1995 (R. 758), and plaintiffs cross appealed on July 21, 1995. (R. 765). The First District Court of Appeals certified the appeal directly to the Florida Supreme Court, which subsequently accepted jurisdiction.

IV. THE FLORIDA SUPREME COURT DECISION

In a 4-3 split decision,[10] the Florida Supreme Court affirmed the Circuit Court in part and reversed it in part. All seven justices agreed that, as enacted, the Amendments greatly expanded the State's preexisting rights and that the State's rights prior to the Amendments had been limited to assignment and subrogation. Although the dissent would have struck down the Amendments abrogating affirmative defenses on due process grounds, the four justices in the majority rejected the facial due process challenge.

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[9] The Court also rejected certain state constitutional claims but ruled that three particular provisions violated the separation of powers provision of the Florida Constitution: (1) section 409.910 (9)(a), permitting joinder and nonidentification of injured Medicaid recipients, (2) section 409.910(1), requiring the "liberal construction" of common law theories of recovery, and (3) section 409.910(9), requiring "liberal construction" of the evidence code on issues of causation and damages.

[10] In fact, only three of the seven justices joined the opinion of the Court. A fourth justice agreed with the result but wrote separately in a short, concurring opinion. 678 So.2d at 1257-58 (App. 34a).

A. The Plurality Opinion

As they had argued below, the plaintiffs argued before the State Supreme Court that the Amendments violated due process "by abolishing common law protections against arbitrary liability" and "by creating a broad institutional bias in favor of the state." Fla. Br. at 62, 64.[11] The plurality opinion's rejection of the due process challenge centered on its view that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 1251 (App. 18a) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)).[12] The opinion reviewed several cases that stand for the proposition that there is no absolute ban to altering common law rights and that courts generally give deference to legislative decisions. 678 So.2d at 1250 (App. 18a-20a). The opinion also recounted a series of Florida decisions (and statutes) which had altered preexisting common law rights—most of them not even discussing constitutional issues and none of them similar in operation to the Act in question. 678 So.2d at 1251-53 (App. 20a-23a). The opinion concluded that "[a]t bottom, we can find no case from the United States Supreme Court that would prohibit the Florida Legislature from abolishing affirmative defenses in the circumstances addressed by the Act." *Id.* at 1251 (App. 20a). At the end of the opinion, the plurality also opined without elaboration that the Act was "a rational response to a public need," apparently referring to the need to provide medical assistance to low income persons. *Id.* at 1257 (App. 32a).[13]

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[11] The Court also ruled that this abrogation did not violate Florida's constitutional right of access to the courts.

[12] Although the Court conceded that "any abolition of an affirmative defense must satisfy the notions of fairness dictated by our due process jurisprudence," 678 So.2d at 1251 (App. 20a), it offered no explanation of how the State's self-help legislation satisfied the standard.

[13] In addition to its federal due process ruling, the Court also reversed (by a 4-3 margin) the lower court's ruling that the Act's

B. The Dissenting Opinion

The three dissenting justices concluded that the Act was "an unconstitutional attempt to strip the tobacco companies of the defenses against smokers' claims which have been successful in the past because of the health warnings on tobacco advertising and packages." *Id.* at 1260 (App. 40a).

In particular, the dissent urged that the Amendments' abrogation of affirmative defenses for the sole benefit of the State violated due process and equal protection. The availability of defenses now hinged solely on the "completely arbitrary" fortuity that the costs of healthcare were later paid by Medicaid. *Id.* at 1259 (App. 38a). The dissent also found it significant that "[t]he State has abrogated to itself a right that no other plaintiff can claim." *Id.* at 1260 (App. 39a-40a).

The dissent starkly illustrated the arbitrariness of the statute by describing how it would work in concrete situations. These examples demonstrated that the only distinction between a successful claim by the State and an unsuccessful claim by an individual recipient that foundered on affirmative defenses was the existence of Medicaid payments. This distinction is "completely arbitrary" and "has nothing to do with the circumstances of how the illness was caused but is based only upon the fortuity that [the]

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provisions concerning joinder of claims and "liberal construction" violated state constitutional provisions on separation of powers. *Id.* at 1254-56 (App. 27a-28a). The Court also unanimously held that three aspects of the Florida statute must be modified or stricken to avoid offending the due process guarantees of the Florida Constitution. In particular, the Court struck the provisions that (1) permitted the State to pursue its newly-created action without identifying individual Medicaid recipients, Fla. Stat. Ann. § 409.910 (9) (a); (2) permitted the State simultaneously to assert joint and several liability and theories of market share liability, *id.* § 409.910 (1) & (9) (b); and (3) abolished the statute-of-repose defense, insofar as that provision revived claims which were time-barred prior to enactment of the Act, *id.* § 409.910 (12) (h). 678 So.2d at 1254-56 (App. 25a-30a).

medical bills were later covered by Medicaid." *Id.* at 1259 (App. 38a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS OFFENSIVE TO DUE PROCESS AND CONFLICTS IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT

The statute creates the trappings of a judicial adjudication of liability, while denying defendants the essence of such an adjudication. The net effect of the Amendments is that the State of Florida's Legislature has directed its courts to ignore affirmative defenses and other established rules of common law and equity in an effort to make sure that the State will win its "lawsuit" for monetary damages. It is as though the State has declared that in football league games, when the State university team's offense is on the field, the opponent's defense must withdraw to the sidelines. Under this Court's prior decisions, such a statute, involving the self-interest of the State, is not entitled to deference but must be subject to rigorous scrutiny. This statute cannot survive such scrutiny.

A. Rigorous Scrutiny Rather Than Deference Applies to Review of the Florida Statute

This Court has applied a standard of rigorous scrutiny rather than deference in considering constitutional challenges to self-interested legislation by the states. This principle has long been recognized in the context of the Contract Clause. U.S. Const. art. 1, § 10, cl. 1. For example, in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the Court struck down a state statute revoking a statutory bond covenant by the Port Authority of New York and New Jersey (a joint state body) not to make certain expenditures on public transport without satisfying agreed-upon financial preconditions. The Court found that deference to the legislature was less appropriate "because

the State's *self-interest is at stake*." *Id.* at 26 (emphasis added).

More recently, the Court ruled that the federal government could not avoid paying damages for breaching a contractual commitment to purchasers of federally-insured savings and loan institutions. The government had promised the purchasers that the "supervisory goodwill" associated with the purchases could be used in computing the required "reserves" under applicable banking regulations, but a subsequently enacted statute reneged on this commitment:

> If the Government is to be treated like other contractors, some line has to be drawn in situations like the one before us between regulatory legislation that is relatively free of government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief.

United States v. *Winstar Corp.*, 116 S. Ct. 2432, 2465 (1996).

The principle of rigorous scrutiny for self-interested legislation applies equally in other constitutional contexts. In *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (Scalia, J.), Justice Scalia noted the differential treatment between "excessive fines" and other forms of punishment under the Eighth Amendment. Unlike other punishments, "fines are a source of [state] revenue," and "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* at 978 n.9. In *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), the Court struck down a pre-hearing forfeiture of property. An "adversary hearing . . . to ensure the requisite neutrality" was "of particular importance here, where the Government ha[d] a direct pecuniary interest in the outcome of the proceeding." *Id.* at 502. In *Wardius* v. *Oregon*, 412 U.S. 470, 474 n.6 (1973), the Court struck down a state rule requiring a criminal defendant to dis-

close a notice of alibi without providing reciprocal discovery against the prosecution, noting that the Court has "been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Cf. United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) (citing *United States* v. *Klein*, 13 Wall. 128 (1872), and explaining the Court's decision in *Klein* that Congress overstepped its constitutional authority to delimit appellate court jurisdiction as based on "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor").

The Amendments single out the State for favorable treatment by giving it rights to recover that are vastly superior to those enjoyed by injured recipients. The only conceivable rationale identified below for the abrogation of the defenses in favor of the State was that it helped fund the State's program of "[p]roviding medical coverage for those in need" and was thus "a rational response to a public need." 678 So.2d at 1256-57 (App. 31a-32a). The mere desire of a state to shift the responsibilities for funding state programs to third parties is an unprincipled and limitless basis for liability and falls well short of justifying the imposition of such an arbitrary rule. Such a rationale may perhaps justify the imposition of taxes to shift the costs of a state's obligations to third parties, but doing so under the pretense that the result follows from a determination of liability at trial before an impartial tribunal reeks of unfairness.

B. The Statute Is Offensive to Due Process

The essence of the Act is to strip away common law defenses based solely on the happenstance that the *State* seeks recovery and that the *State* has made Medicaid payments on behalf of a person allegedly injured by a "liable third party." A manufacturer whose product injures a privately insured party may still assert affirmative de-

fenses (even in a lawsuit by the insurance company), as may a manufacturer sued by a Medicaid recipient. Yet if the medical expenses of the person injured happen to have been paid by Medicaid *and* the *State* brings suit, these defenses are lost. The liability of a manufacturer thus turns on whether the State happens to later pay for the injured person's medical bills. This is a distinction without any principled difference; the State's direction to its courts to impose "liability" without consideration of defendants' defenses is blatant self-dealing that is wholly arbitrary and violates fundamental tenets of due process.

Given the breadth of the self-interest served by the Amendments, it is hardly surprising that there is no prior decision by this Court squarely addressing the issue raised by this petition. There are precedents from this Court, however, demonstrating that Florida's self-serving abrogation of affirmative defenses violates due process.

For example, in striking down state procedures that were inadequate to protect against the arbitrary imposition of punitive damages, the Court ruled that a state's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co.* v. *Oberg,* 114 S. Ct. 2331, 2339 (1994). When states remove common law procedures providing "protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* at 2340.

In another case striking down a punitive damages award on due process grounds, Justice Breyer's concurring opinion found it dispositive that state law "provided no significant constraints or protection against arbitrary results." *BMW of N. Am., Inc.* v. *Gore,* 116 S. Ct. 1589, 1605 (1996) (Breyer, J., concurring). In this case, far from protecting against such arbitrariness, the Act *ensures* arbitrariness: in effect, for no reason better than the State's wish to ensure its own success at trial, the statute simply

dismisses the obstacles to the State's recovery, including affirmative defenses that would be valid against individual recipients.

As reflected in the above punitive damages decisions, the Fourteenth Amendment's proscription against deprivation of property "without due process of law," U.S. Const. amend. XIV, plainly applies to state tort law. Although the Constitution certainly gives states leeway in fashioning common law rules of tort liability, this Court's precedents establish that due process is violated when—as here—a state does so "in an arbitrary and irrational way." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)); *see also Martinez* v. *California*, 444 U.S. 277, 282 (1980) (noting in the context of tort law the due process interest "in protecting the individual citizen from state action that is wholly arbitrary or irrational"). Likewise, the state may not regulate judicial procedure in a way which " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)).

The same principle underlies this Court's decisions regarding the constitutionality of statutory presumptions. Thus, "[a] statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause." *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, 642-43 (1929) (striking down presumption of negligence where "[t]he mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one"); *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) ("It is essential that there shall be some rational connection be-

tween the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate").

The arbitrariness here is manifest. If an allegedly injured Florida consumer brings suit against a manufacturer, no determination that the manufacturer is "liable" can be made without considering its affirmative defenses, including the consumer's personal choice to accept the risks or the consumer's own negligence. The same is true if the suit is brought by the consumer's insurer. Yet the defenses suddenly evaporate if, instead of the consumer or a private insurer, the *State* brings suit seeking reimbursement for Medicaid expenses relating to treatment of precisely the same injuries to the same consumers.

As one commentator notes, "[w]hether Florida Medicaid picks up or does not pick up the portion of [the recipient's] injuries for which [the recipient] himself was solely responsible has nothing to say to us, for there is no reason that that datum can rationally have any effect at all so to enlarge the responsibility of the [defendant] post hoc." William Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 Fla. L. Rev. 563, 575 (1994). The only basis upon which the State even presents its claim is its payment of the injured party's medical bills. Yet, as Professor Van Alstyne writes: the State's mere dictat that " 'We paid [the recipient's] medical bill and, because we did, you must pay us . . .' is not consistent with due process of law." *Id.* at 569-70.

The dissenting justices below emphasized this fundamental point. As they put it, "[w]hether a claim is Medicaid-eligible has no more relevance in measuring whether a party may raise an affirmative defense than the question of whether [a recipient] has brown hair or blonde hair." 678 So.2d at 1259-60 (App. 38a). Making liability dependent upon the State's subsequent decision to

extend Medicaid benefits has "due process implications [which] are overwhelming." *Id.* at 1259-60 (App. 39a).

If the State had simply abrogated common law defenses generally—which it did not—even *that* action would have raised serious due process concerns (particularly if the State provided no *quid pro quo* to defendants). *See, e.g., Fein* v. *Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from dismissal of appeal) ("[w]hether due process requires a legislatively enacted compensation scheme to be *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states"); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring); *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917). But the evil here far exceeds such a neutral change in the common law; the Amendments are special interest legislation abrogating the defenses *for the exclusive benefit of the State.* As the dissent observed below: "how can it be that *only* when the State makes a claim, there can be no affirmative defenses? The State has arrogated to itself a right that no other plaintiff can claim." 678 So.2d at 1260 (App. 39a-40a).

II. THE DUE PROCESS QUESTION DETERMINED BELOW IS IMPORTANT BECAUSE IT CONCERNS AN ISSUE CENTRAL TO A GROWING LITIGATION MOVEMENT

As noted above, even if viewed in isolation, the Florida Supreme Court's decision merits review by this Court. The context in which this lawsuit arises, however, underscores the urgent need for review. As shown below, the Amendments are a classic example of bad law adopted to attack a group of unpopular defendants.

The Florida Act, on its face, applies to all industries, and neither the statute nor the applicable legal principles can be limited to a particular industry. However, it is

common knowledge (and indeed was argued by the State below)[14] that the statute is targeted at the tobacco industry. Indeed, the sole recovery action under the statute to date is an omnibus lawsuit pending against various tobacco defendants in which Florida seeks to recoup vast amounts of Medicaid expenditures.[15]

The Court can take judicial notice that the tobacco industry today is, to say the least, unpopular with certain segments of public opinion and certain government officials. Although such unpopularity should not in and of itself either detract from or add to the legal rights of companies involved in the tobacco business, the sad fact is that unpopular groups or individuals have often been the target of unconstitutional activity. It cannot seriously be questioned that tobacco companies, as unpopular as they may be in some quarters, are entitled to due process and protection from arbitrary state action. Fortunately, this Court is particularly vigilant to protect the constitutional rights of such unpopular groups. Indeed, such protection is critical when—as here—legislatures and courts make broad changes to laws of general application under cover of the unpopularity of a particular defendant or group of defendants.

The Florida Act is best evaluated in the context of a broad-based litigation movement against an unpopular group of defendants that is now sweeping the nation.

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[14] R. 322-23 & n.1.

[15] In fact, Governor Lawton Chiles of Florida signed an executive order directing state authorities to refrain from enforcing the law "against any defendants other than those responsible for disease and death caused by tobacco produces and those responsible for disease and death caused by the sale and consumption of illegal drugs." Fla. Exec. Order No. 95-109 (March 28, 1995) (App. 72a). The Circuit Court for Leon County found that the Governor lacked authority to limit a legislative enactment by executive order and thus denied the State's motion for summary judgment against the non-tobacco plaintiffs below. (R. 476-77) (App. 47a). Nevertheless, the State has expressed no intention of enforcing the law beyond the industries identified in the executive order.

Placing this movement—and the Florida Act—in perspective requires a brief review of the history of smoking and health litigation over the past 40 years.

Lawsuits by Individuals. Over the last few decades, numerous products liability lawsuits by individual smokers seeking to recover damages for injuries allegedly caused by cigarette smoking have been filed in the state and federal courts. To date, such lawsuits have been almost uniformly rejected by both judges and juries. Many of the lawsuits have been resolved based on affirmative defenses (such as assumption of the risk or contributory negligence). One leading case—decided four years ago by this Court—is *Cipollone* v. *Ligget Group, Inc.*, 505 U.S. 504 (1992), in which the Court found that the Federal Cigarette Labeling and Advertising Act, as amended in 1969, preempted certain common law claims due to the mandated warning labels on cigarette packages.

Since the decision in *Cipollone,* numerous other individual lawsuits have been filed. In fact, over 200 such lawsuits are currently pending in the state and federal courts. To date, only one case—which is still subject to appeal—has resulted in a judgment awarding damages against a cigarette manufacturer. *Carter* v. *Brown & Williamson, Co.*, No. 95-934 (Fla. Cir. Ct. 1996). Thus, the overwhelming consensus of the decided cases is that plaintiffs may not excuse themselves from responsibility for their own choices by suing tobacco manufacturers. That, of course, is one of the principal defenses to which the State's chief legislative draftsman referred when he said that "they're going to have have to come to court, and no more of these stupid little defenses." (Complt. ¶ 16) (R. 6).

The States Bring Suit: The Medicaid Reimbursement Movement. Certain state attorneys general, supported by a network of private attorneys, have initiated a movement to seek massive damages against the tobacco companies as "reimbursement" for medical expenditures made by the states on behalf of the asserted victims of tobacco. Primarily, these lawsuits seek recovery of amounts paid by

states on behalf of Medicaid beneficiaries. The first such lawsuit was initiated by the Attorney General of Mississippi in May 1994, and 20 such lawsuits are currently pending in state and federal courts throughout the country.[16] In addition, similar lawsuits have been filed by a number of local governments, including the city of New York and the counties of Los Angeles and San Francisco.

Central to all these Medicaid reimbursement lawsuits against tobacco defendants is an attempt to circumvent the causation issues and affirmative defenses that have been dispositive of the claims of individual plaintiffs in tobacco litigation over the past forty years. Florida has attempted to achieve this through legislative fiat. Other states also attempt, one way or another, to avoid proof of individual injury and affirmative defenses through pursuit of novel claims of unjust enrichment, restitution, indemnity, public nuisance, and the like. The lawsuits all seek recovery for Medicaid expenditures without proof that a single individual recipient has a claim against any defendant, and they seek to preclude defendants from asserting traditional common law defenses.

While Philip Morris believes that the various state attorneys general have determined to target these cases against the manufacturers of tobacco products, there is nothing in the Florida statute—or in the novel common law or equitable theories pursued by other states—that could preclude additional lawsuits against manufacturers of any or all other products (*i.e.*, automobiles, liquor, pharmaceuticals, handguns, or any other product that al-

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[16] In addition to Florida and Mississippi, the states in which Medicaid reimbursement lawsuits are pending include the following: Alabama, Arizona, Connecticut, Kansas, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Oklahoma, Ohio, New Jersey, Texas, Utah, Washington, and West Virginia.

No Medicaid reimbursement lawsuit has been tried to date. Trials are scheduled in three of the cases, including Florida's, in 1997.

legedly injures persons covered by Medicaid). Given the size and extent of the federal Medicaid program, the issues presented by this petition are highly significant to the nation's welfare and economy.

III. THE DUE PROCESS QUESTION DETERMINED BELOW CONCERNS THE FUNDAMENTAL ISSUE OF WHETHER A STATE MAY PROMULGATE SELF-HELP LEGISLATION WHICH UNIQUELY AND ARBITRARILY FAVORS THE STATE AS A LITIGANT OVER ITS LITIGATION OPPONENTS

The federal issues involved here merit this Court's attention even if the Court considers solely the impact of the Florida Supreme Court's ruling on Medicaid reimbursement lawsuits. Yet the legal issue resolved by the Florida court has important ramifications well *beyond* the context of tobacco litigation. If allowed to stand, the opinion below supports the apparently limitless proposition that any state—as an individual litigant seeking to recover damages for itself from private parties—may fashion special rules of liability applicable solely to itself and designed to ensure that the state prevails in the courtroom when others could not. Permitting legislatures to enact self-help remedies designed to ensure the victory of the state in court is bound to spawn frequent abuses of due process and individual rights.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 5, 1996

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

86-213

AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*,
Appellants/CrossAppellees,

vs.

ASSOCIATED INDUSTRIES OF FLORIDA, INC., *et al.*,
Appellees/Cross-Appellants.

[June 27, 1996]

OVERTON, J.

We have for review a final order and declaratory judgment of the Second Judicial Circuit Court holding that significant portions of the Medicaid Third-Party Liability Act (Act)[1] are unconstitutional. The trial court also held that the Agency for Health Care Administration (Agency), the entity charged with enforcing that Act, was structured in violation of the Florida Constitution. The First District Court of Appeal certified that this judgment passed on a matter of great public importance that required immediate resolution by this Court. We accepted jurisdiction and heard oral argument. Art. v, § 3(b)(5), Fla. Const.

At issue is the State's ability to fashion a cause of action to recover health care expenditures made on behalf of Floridians and occasioned by the allegedly tortious

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[1] § 409.910, Fla. Stat. (1995).

conduct of others. At the outset, we note that the judicial branch must be cautious when evaluating the choices made by the legislative branch as to the appropriate funding for programs it has deemed important to the public welfare. We must avoid unnecessarily limiting the funding options available to the legislature when addressing today's policy problems. With this philosophy in mind, we now proceed.

In summary, we affirm the judgment in part and reverse the judgment in part. First, we find no legal infirmity in the structure of the Agency. We next, with two significant caveats, find the Act to be facially constitutional. We have no cause to invalidate, on its face, this legislative enactment aimed at the recoupment of Medicaid expenditures necessitated by the tortious conduct of others. The State concedes that it must demonstrate a defective product or negligent conduct, it must establish causation, and it must prove damages. Certainly the legislature may pursue these legitimate public policy objectives. We do, however, limit our holding in the following two ways. First, a ruling of facial constitutionality does not preclude a later action challenging the manner in which the Act is applied. Indeed, some provisions of the Act may give rise to some serious constitutional issues at a later point in time. Second, while the essential aspects of the Act are facially constitutional, the following provisions must be modified or stricken to avoid offending the due process guarantees of the Florida Constitution: (1) the authority to pursue an action without identifying individual Medicaid recipients must be stricken; (2) the abolition of a statute-of-repose defense is ineffective to revive time-barred claims; and (3) the provision for com bining the theories of market share liability and joint and several liability must be stricken even though either theory may be used separately.

We therefore strike the offensive provisions and leave the remainder of the Act intact.

Legislative and Case History

Importantly, the underlying basis for the government's recovery of health care costs expended for its citizens did not begin with the 1994 modifications to the Act that are at issue in this proceeding. Instead, the State has been legislatively authorized to pursue such reimbursement since Medicaid was enacted in 1968. *See* 42 U.S.C. § 1396a (a)(25)(1994). The State originally used federal law as a basis for its actions. In 1978, however, the legislature enacted statutory authority by which the State could pursue recovery of expenditures from third parties.[2] At that point, the State was given a traditional subrogation action.[3] Such an action allowed the State to occupy the same position as a Medicaid recipient in its pursuit of thirdparty resources. Then, in 1990, the existing statutory authority was substantially modified with the passage of major amendments to the Act.[4] The purpose of this modification was to strengthen the State's ability to recover funds expended for Medicaid costs. The following are the 1990 modifications relevant to this case:

> (1) . . . Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other credi-

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[2] Ch. 78-433, § 14, Laws of Fla.

[3] The 1978 enactment included the following provision:

> (b) A public assistance applicant or recipient shall inform the department of any rights he has to third-party payments for medical services. The department shall automatically be subrogated to any such rights the recipient has to third-party payments and shall recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the recipient.

§ 409.266(3), Fla. Stat. (Supp. 1978).

[4] In 1990, the original subsection containing the statutory subrogation provison was repealed. Ch. 90-295, § 34, Laws of Fla. In its stead, a new section was enacted. Ch. 90-295, § 33, Laws of Florida.

tors paid. Principles of common law and equity as to assignment, lien, and subrogation are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. . . .

(7) When the department provides, pays for, or becomes liable for medical care under [the Medicaid program], it shall have the following rights, as to which the department may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:

. . . .

(12) The department may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholders of the collateral.

§ 409.2665, Fla. Stat. (Supp. 1990).

The Act was again modified in 1994.[6] It is these amendments that are directly at issue in this case. The relevant provisions of the Act affected by the 1994 amendments, with those amendments identified by underlining or strike -through,* read as follows:

409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable.—

(1) It is the intent of the Legislature that Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid.

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[6] Ch. 94-251, § 4, Laws of Fla.

[*] Material set in bold are deletions; material set in italics are additions.

If benefits of a liable third party are *available* **discovered or become available after medical assistance has been provided by Medicaid,** it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien **and** subrogation, *comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party,* are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources; *such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency.* It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources. *Common law theories of recovery shall be liberally construed to accomplish this intent.*

(2) This section may be cited as the "Medicaid Third-Party Liability Act."

(4) After the department has provided medical assistance under the Medicaid program, it shall seek recovery of reimbursement from third-party benefits to the limit of legal liability and for the full amount of third-party benefits, but not in excess of the amount of medical assistance paid by Medicaid, as to:

. . . .

(b) Situations in which *a third party is liable and the liability or benefits available are discovered either before or* **the department learns of the existence of a**

before or **—the department learns of the existence third party or in which third party benefits are discovered or become available** after medical assistance has been provided by Medicaid.

. . . .

(6) When the department provides, pays for, or becomes liable for medical care under the Medicaid program, it has the following rights, as to which the department may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:

(a) The agency has a cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient.

. . . .

(9) In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to actions by the third parties or circumstances which involve common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding. In any action brought under this subsection, the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages. The issue of causation and damages in any such action may be proven by use of statistical analysis.

(a) —In any action under this subsection wherein the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been

made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.

(b) In any action brought pursuant to this subsection wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market share substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved in seeking recovery against such liable third party individually.

. . . .

(12)(h) Except as otherwise provided in this section, actions to enforce the rights of the department under this section shall be commenced within 5 years after the date a cause of action accrues, with the period running from the later of the date of discovery by the department of a case filed by a recipient or his legal representative, or of discovery of any judgment, award, or settlement contemplated in this section, *or of the provision of medical assistance to a recipient. Each item of expense provided by the agency shall be considered to constitute a separate cause of action for purposes of this subsection. The defense of statute of repose shall not apply to any action brought under this section by the agency* **or of discovery of facts giving rise to a cause of action under this section.** Nothing in this paragraph affects or prevents a proceeding to enforce a lien as set forth in subparagraph (6)(c)9.

. . . .

(19) In cases of suspected criminal violations or fraudulent activity, on the part of any person including a liable third party, the department is authorized to take any civil action permitted at law or equity to recover the greatest possible amount, including without limitation, treble damages under s. 772, 73 F.S.

> *In any action in which the recipient has no right to intervene, or does not exercise his right to intervene. any amounts recovered under this subsection shall be the property of the agency, and the recipient shall have no right or interest in such recovery.*

Ch. 94-251, §, Laws of Fla. (emphasis added in part).

Subsequent to its 1994 modification, Governor Lawton Chiles ordered the relevant executive branch officials to pursue recovery of Medicaid expenditures from only the tobacco industry.[6] Representatives of certain industries affected by the governor's order (Associated Industries) filed this declaratory judgment action in the Circuit Court in Leon County. The lawsuit alleged that the 1994 amendments were unconstitutional and that the Agency was structured in violation of the Florida Constitution. The trial court ruled that: (1) the Agency was in fact structured in violation of the twenty-five department limitation in article IV, section 6, of the Florida Constitution; (2) the 1994 amendments encroached upon this Court's rulemaking authority and thereby violated the separation-of-powers doctrine; (3) the 1994 amendments, because they created new substantive rights, could only be applied prospectively; and (4) the attempted elimination of the statute of repose defense could not revive time-barred claims. The State has appealed all of these rulings in this action.

Associated Industries has cross-appealed, raising three additional issues. It argues that: (1) the 1994 amendments violate article I, section 21. of the Florida Constitution by denying access to the courts; (2) the 1994 amendments encroach upon the separation-of-powers doctrine by prescribing relevancy and admissibility requirements for certain types of evidence; and (3) due process of law is offended by the 1994 amendments in violation of both the Florida and federal constitutions.

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[6] Fla. Exec. Order No. 95-105 (Mar. 28, 1995).

Numerous amicus briefs have been filed.[7]

Many of the challenges outlined above are redundant in the sense that they attack the same clauses of the Act with differing legal theories. We choose to organize our analysis by successively addressing the specific provisions of the Act that are challenged. We will evaluate each implicated clause and dispose of all legal challenges to that clause in the same portion of our opinion. Prior to reaching that discussion, though, it is necessary to address (1) the challenge to the Agency's constitutionality and (2) the nature and origin of the State's cause of action.

The Constitutionality of the Agency

Associated Industries argues that the Agency was created in violation of article IV, section 6, of the Florida Constitution because it resulted in the establishment of a twenty-sixth department. The trial court agreed. This holding would preclude the Agency from pursuing the causes of action authorized by the Act.

The relevant part of the Florida Constitution reads as follows:

> All functions of the executive branch of state government ahall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department unless otherwise provided in this constitution, shall be placed by

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[7] Amicus curiae briefs were filed by (1) National Federation of Independent Business and Florida Retail Federation, Inc.; (2) Hillsborough County Hospital Authority; (3) Good Samaritan and St. Mary's Hospitals; (4) Florida Health Care Association, Inc.; (5) Hospital Board of Directors of Lee County, d]b/a Lee Memorial Health System; (6) Dade County Public Health Trust; (7) Wine and Spirits Distributors of Florida, Inc.; and (8) Sacred Heart Hospital of Pensacola.

> law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor . . . .

Art. IV, § 6, Fla. Const.

This section of the constitution makes it abundantly clear that Florida shall have a limted executive branch. With the exception of those departments specifically authorized by the constitution, there cannot be more than twenty-five executive departments in existence at any time.

The legislature created the Agency in 1992. That act reads as follows:

> Be It Enacted by the Legislture of the State of Florida:
>
> Section 1. Effective July 1, 1992, section 20.42, Florida Statutes, is created to read:
>
> 20.42 Agency for Health Care Administration. There is created the Agency for Health Care Administration within the Department of Professional Regulation. The agency shall be a separate budget entity, and the director of the agency shall be the agency head for all purposes. The agency shall not be subject to control, supervision, or direction by the Department of Professional Regulation in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.
>
> (1) DIRECTOR OF HEALTH CARE ADMINISTRATION. The head of the agency is the Director of Health Care The Administration, who shall be appointed by the Governor. The director shall serve at the pleasure of and report to the Governor.

Ch. 92-33, § 1, at 241, Laws of Fla.

The trial court based its conclusion that this agency was "unconstitutionally structured in violation of the 25

department limit of Article IV, § 6 of the Florida Constitution" upon two assumptions: (1) that the Agency is a department; and (2) that twenty-five departments were in place prior to the Agency's creation. We disagree. As set out below, we conclude that the Agency was created as a valid agency within an existing department by the express language of the statute. Consequently, we need not determine the number of departments in existence in 1992.

This Court is deferential when reviewing a legislative determination as to the meaning of a constitutonal provision. In *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 669 (Fla. 1970), we stated: "[W]here a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling." This rule of construction is tempered by reason, and this Court will not give a constitutional provision an impossible or irrational construction simply to validate a given statute.[8]

Our role is to determine whether the legislature has adopted a rational construction of the constitutional limitation on executive departments. The legislature has set forth a policy concerning this issue as follows:

> 20.02 Declaration of policy,—
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> . . . .
>
> (2) Within constitutional limitations, the agencies which comprise the executive branch should be consolidated into a reasonable number of departments consistent with executive capacity to administer effectively at all levels. The agencies in the executive branch should be integrated into one of the departments of the executive branch to achieve maximum

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[8] *See Holley v. Adams*, 238 So. 2d 401 (Fla. 1970).

efficiency and effectiveness as intended by s. 6, Art. IV of the State Constitution.

(5) *Departments should be organized along functional or program lines.*

§ 20.02, Fla. Stat. (1993) (emphasis added). Thus, the legislature has clearly stated its intention that departments should be organized with special attention given to keeping similar functional responsibilities within the same department.

The Agency was created as an independent agency within the Department of Professional Regulation. The Agency's director is appointed by, and reports directly to, the governor. We find that the placement of the Agency within the Department of Professional Regulation [9] was within the prerogative of the legislature. It cannot be disputed that the Agency's functional responsibilities include the regulation of health care activities in the state. The Agency does much more than initiate claims to recover Medicaid expenditures from third parties. Numerous amicus briefs filed by the hospital industry indicates a high level of concern regarding the trial court's adverse ruling as to the Agency. Those briefs explain the numerous Agency responsibilities in the regulation of hospitals and health-care providers—responsibilities certainly indicating that the Agency is a vital regulatory body within the health-care industry. The Department of Professional Regulation was responsible for many similar functions. Thus, the Agency's placement was a logical extension of the regulatory functions of the Department of Professional Regulation.

We find no merit in Associated Industries' claim that our functional analysis will render the disputed depart-

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[9] As of July 1, 1993, the Department of Professional Regulation was merged with the Department of Business Regulation to create the Department of Business and Professional Regulation. Ch. 93-220, Laws of Fla.

mental limitation "meaningless." First, nothing changes as to the number of departments allowed in Florida. To accept Associated Industries' argument would mean that the legislature could not direct that an agency within a department must report directly to the governor. That result was neither intended nor required by the constitutional limitation on the number of departments. Our decision today does not permit the legislatures to create a twenty-sixth department. Neither does the legislature gain the freedom to create numerous autonomous agencies. As we have stated, all agencies must be functionally related to the departments in which they are placed. We certainly are not sanctioning departments that resemble hodgepodges.[10] However, we do not believe that the constitutional departmental limitation prevents the legislatures from placing an agency within a department, even though the agency itself reports directly to the governor, so long as that agency is functionally related to the department in which it is placed. Accordingly, we find no constitutional infirmity in the Agency's structure.

The Cause of Action

We now must address the nature of the State's cause of action. We recognize that many aspects of the Act have been challenged on constitutional grounds. However, in view of the numerous theories as to the origin and substance of the State's action, we choose to first define the contours of that action and then evaluate the Act against constitutional standards.

Associated Industries asserts that the State was limited to traditional notions of subrogation, assignment, and lien until the legislature amended the Act in 1994, and that, under these traditional theories, the State would be subject to the same legal obstacles that the Medicaid recipient would face in pursuing a claim. Associated Industries

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[10] We note that, instead of the prophesied governmental expansion, the legislature has actually consolidated departments since 1992.

contend that it was the 1994 modifications that gave the State an independent cause of action and abrogated the affirmative defenses available to a third-party tortfeasor. We agree that it was the 1994 modifications, coupled with the 1990 amendments, that established an independent cause of action.

In 1978, the Florida Legislature clarified the State's rights in recovering third-party payments made to Medicaid recipients by enacting the following provision:

> (b) A public assistance applicant or recipient shall inform the department of any rights he has to third-party payments for medical services. The department shall automatically be subrogated to any such rights the recipient has to third-party payments and shall recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the recipient.

§ 409.266(3), Fla. Stat. (Supp. 1978). This statutory language gave the State the auhtority to pursue third-party resources. However, the method of pursuit was limited to traditional subrogation means. In 1990, the legislature expanded the State's ability to pursue third-party resources. In amending the Act, the legislature recognized that the State's traditional subrogation rights were not sufficient. The amending language used in 1990 is expansive. For instance, a third party, the potential defendant in any action brought under the Act, was defined as

> an individual, entity, or program, excluding Medicaid, that is, may be, could be, should be, or has been liable for all or part of the cost of medical services related to any medical assistance covered by Medicaid.

§ 409.2665(3)(p), Fla. Stat. (Supp. 1990). Certainly this broad definition of third parties covers tortfeasors that caused a Medicaid recipient's health problems. The intent of the statute is clear that "Medicaid be the payer of last

resort for medically necessary goods and services furnished to Medicaid recipients," and that, "if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources." § 409.2665(1), Fla. Stat. (Supp. 1990). Two other clauses are important. First, the legislature's 1990 language makes significant changes to the State's traditional subrogation action. It reads:

> Principles of common law and equity as to assignment, lien, and subrogation are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources.

§ 409.2665(1), Fla. Stat. (Supp. 1990).

The second major legislative change in the 1990 Act appears in subsection (12) of section 409.2665, Florida Statutes (Supp. 1990), and it states:

> (12) The department may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.

It is clear that the 1990 legislation, at the very least, moves the States to the front of the line vis-a-vis other innocent parties if any benefits become available, and these provisions give the State an expanded right to take priority over innocent parties in claiming "a pot of money once obtained."

Assuming that the content of the 1990 Act is open to numerous interpretations, the 1994 amendments clarify the State's cause of action definitively. After the modifications made in 1994, there can be no doubt that the Act is intended to create an independent cause of action to which traditional affirmative defenses do not apply. The major

modifications made in 1994 are summarized below. First, the Act restated and expanded its language indicating that all affirmative defenses be abrogated to the extent necessary to ensure the State's recovery.[11] Second, the Act now relieves the State of any duty to identify the individual recipients of Medicaid payments.[12] Third, the statute of repose defense was abrogated in any action pursued by the Agency under the Act.[13] Fourth, the Act now clarifies that the State has the authority to pursue all of its claims in one proceeding.[14] Fifth, the State was given the authority to utilize theories of market share liability in conjunction with the theory of joint and several liability.[15] Sixth, the State was given the authority to use statistical analysis in proving causation and damages.[16] Indeed, these six modifications are the six substantive aspects of the Act challenged in this action.

Once again, there can be no argument after 1994 that the State's cause of action is derivative in the nature of a subrogation, assignment, or lien. Rather, it is a new, independent cause of action that requires the State to prove: (1) either negligence or a defective product; (2) causation; and (3) damages. We have now defined the cauuse of action as it exists after the 1994 amendments. We now address the constitutional challenges to each of the six specific 1994 amendments to the Act.[17]

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[11] § 409.910(1), Fla. Stat. (1995).

[12] § 409.910(9)(a), Fla. Stat. (1995).

[13] § 409.910(12)(h), Fla. Stat. (1995).

[14] § 409.910(9), Fla. Stat. (1995).

[15] § 409.910(1), (9)(b), Fla. Stat. (1995).

[16] § 409.910(9), Fla. Stat. (1995).

[17] We appreciate that many commentators have written expressing their views on these 1994 amendments. *See* Jonathan S. Massey, *The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis*, 46 U. Fla. L.

Abrogation of Affirmative Defenses

As previously explained, the Act created, by legislation enacted in 1990 and 1994, a new cause of action by which the State may pursue liable third parties to recover Medicaid expenditures. This new cause of action was created with the intent that no affirmative defenses be available to defendants. Specifically, the following language from the Act is relevant here:

> Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources: such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section.

§ 409.910(1), Fla. Stat. (1995). The abrogation of affirmative defenses has been challenged as being violative of the due process guarantees in both the federal and Florida [18] constitutions. It is also challenged as being violative of Florida's access-to-courts provision.[19] We reject both contentions insofar as we resolve the facial challenge to the Act. As with many legislative responses to modern policy problems, the vehicle chosen here to effectuate the State's policy goals has the potential to violate the

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Rev. 591 (1995); Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 U. Fla. L. Rev. 609 (1995); Scott Richardson, *Attorney General's Warning: Legislation May Now Be Hazardous to Tobacco Companies' Health*, 28 Akron L. Rev. 291 (1995); William W. Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 U. Fla. L. Rev. 563 (1995).

[18] The due process clause of the Florida Constitution is found in article I, section 9.

[19] Art. I, § 21, Fla. Const.

due-process rights of Florida's citizens. We find, however, that any such problems will arise in the application of the Act's provisions. We are not currently faced with that issue. On its face, the provision allowing for the abrogation of affirmative defenses is constitutional under both the federal and Florida constitutuions.

The United States Supreme Court has recognized that states necessarily have the ability to fashion new tort remedies to confront new situations. The ability of states to properly address the needs of their citizens is an important function of state government. Indeed, to rule otherwise would put the states in a straitjacket. Justice Marshall responded in the following way when confronted with the contention that California could not alter the common law of trespass:

> Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 94, 100 S. Ct. 2035, 2047, 64 L. Ed. 2d 741 (1980) (Marshall, J., concurring).

Admittedly, the scope of due process jurisprudence has not been as well defined as other areas of American law. It has been written that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). We approach the due process analysis in this case by way of analogy.

In 1919, the United States Supreme Court reviewed the Employers' Liability Law enacted by the State of Arizona. That law was challenged as being violative of

employers' due process rights. The United States Supreme Court disagreed and affirmed. In a passage strikingly relevant to today's decision, it wrote:

> Some of the arguments submitted to us assail the wisdom and policy of the act becausue of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and as tending not to obviate but to promote litigation, and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

Arizona Copper Co. v. Hammer, 250 U.S. 400, 419, 19 S. Ct. 553, 555, 63 L. Ed. 1058 (1919).

The *Hammer* ruling is appropriate today for two reasons. First, it demonstrates that states have the power to address contemporary problems by creating new causes of action. Such actions need to provide all of the defenses to which some potential defendants have become accustomed. Second, the *Hammer* decision reminds us that we must refrain from evaluating the wisdom of acts adopted by the legislative branch. *See, e.g., University of Miami v. Echarte,* 618 So. 2d 189, 195 (Fla.), *cert. denied,* 114

S. Ct. 304, 126 L. Ed. 2d 252 (1993) (discussing deference to be given to legislative determinations of public policy and facts in construing the medical malpractice provisions attacked as violative of the due process and access-to-the-courts provisions of the Florida Constitution). At bottom, we can find no case from the United States Supreme Court that would prohibit the Florida Legislature from abolishing affirmative defenses in the circumstances addressed by the Act. We do not stop our analysis at this point, though. We now discuss the precedent from this Court demonstrating the propriety of our conclusion.

Associated Industries is essentially arguing that there is an absolute constitutional right to particular affirmative defenses once they have been created. We disagree. Certainly any abolition of an affirmative defense must satisfy the notions of fairness dictated by our due process jurisprudence. That recognition is quite different, however, from creating an absoluute bar to the elimination of affirmative defenses. Florida's case law and existing statutes clearly demonstrate that such a bar has never existed.

First, we recall a striking example. In 1973, this Court eliminated the defense of contributory negligence, which prohibited a claimant from recovering any damages if the claimant was even one percent negligent. In its place, the Court adopted a pure form of comparative negligence, which allows a claimant to recover even though the claimant is ninety-nine percent negligent. *See Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973).

Second, in *Smith v. Department of Insurance,* 507 So. 2d 1080 (Fla. 1987), we recognized, by denying constitutional attacks upon section 768.81, Florida Statutes (Supp. 1986), *id.* at 1090, 1091, the legislature's authority to legislate in respect to comparative negligence by legislative modifications of the common-law doctrine of joint and several liability. It is noteworthy that pursuant to

section 768.81, Florida Statutes (1995), the common-law doctrine of joint and several liability remains applicable to economic damages in instances in which a party's percentage of fault equals or exceeds that of a particular claimant. Thus, in respect to economic damages, we have recognized the legislature has the constitutional authority to statutorily authorize a qualifying plaintiff to secure a total recovery from a party who, though jointly liable, has very minimal comparative fault. This is significant because the Act, in abolishing affirmative defenses, is likewise setting forth, by statute, the basis for liability for purely economic damages and how liability for those damages is to be apportioned.

Third, we examine the invasion of privacy action created by this Court. In *Cason v. Baskin,* 155 Fla. 198, 20 So. 2d 243 (1945), this Court recognized and created a distinct right of privacy as part of our tort law that made particular conduct [20] actionable. In addressing the likely affirmative defenses that defendants might attempt to use, this Court ruled:

> Neither the truth of the published matter, nor the entire absence of any malice or wrongful motive on the part of the writer or publisher, constitute any defense to such an action; nor does the plaintiff have to allege or prove any special or pecuniary damages.

Id. at 217, 20 So. 2d at 252. Surely truth has historic roots as an affirmative defense. This Court, however, cre-

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[20] The four types of wrongful conduct that can all be remedied with resort to an invasion of privacy action are: (1) appropriation —the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion—physically or electronically intruding into one's private quarters; (3) public disclosure of private facts—the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye—publication of facts which place a person in a false light even though the facts themselves may not be defamatory. *Forsberg v. Housing Auth. of Miami Beach,* 455 So. 2d 373, 376 (Fla. 1984) (Overton, J. concurring).

ated a new cause of action and abolished truth as an affirmative defense thereto. There was no suggestion that such an act violated that Court's understanding of due process jurisprudence.

Fourth, in Florida's Pollutant Discharge Prevention and Control Act, chapter 376, Florida Statutes (1995), we find a similar limitation of long-established affirmative defenses. In proceedings under that chapter, the State need not prove negligence. The defenses are limited as follows:

> The only defenses of a person alleged to be responsible for the discharge to an action for damages, costs, and expenses of cleanup, or abatement, shall be to plead and prove that the occurrence was solely the result of one of the following or any combination of the following:
>
> (a) An act of war.
>
> (b) An act of government, either state, federal, or municipal.
>
> (c) An act of God, which means only an unforeseeable act exclusively occasioned by the violence of nature without interference of any human agency.
>
> (d) An act or omission of a third party, without regard to whether any such act or omission was or was not negligent.

§ 376.12(6), Fla. Stat. (1995).

Fifth, we look at *Waite v. Waite,* 618 So. 2d 1360, 1361 (Fla. 1993), in which we abolished interspousal immunity as an absolute bar to liability. Previously, this was a traditional affirmative defense that had been recognized in this State to varying extents.[21] However, we held that "both public necessity and fundamental rights re-

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[21] *See Sturfano v. Brooks,* 523 So. 2d 1126 (Fla. 1988) (abrogating interspousal immunity in situations where no public policy reasons exist for its continuance).

quire[d] judicial abrogation of the doctrine." *Id.* at 1361. Once again, there was no suggestion that the abolition of that longstanding affirmative defense was violative of our due process jurisprudence.

Sixth, in *West v. Caterpillar Tractor Company,* 336 So. 2d 80, 92 (Fla. 1976), we adopted the doctrine of strict liability. At that time, we explicitly rejected any affirmative defenses based on a user's failure to discover a defect or a user's failure to guard against the possibility of a defect. Restated, we abolished both the longstanding affirmative defense of contributory negligence and its successor, comparative negligence. Such abolition did not offend our due process jurisprudence.

As a result, we are left to ask whether the Act is distinguishable, on its face, from these other situations in which affirmative defenses have been abolished. We find no such distinction. Therefore, we rule that the Act's abrogation of affirmative defenses is facially constitutional. We emphasize, however, that Florida courts will remain free to hear challenges to the actual application of such abrogation.

Next, we reject the claim that the abolition of affirmative defenses violates the access-to-courts provision found in article I, section 21, of the Florida Constitution.

In *Kluger v. White,* 281 So. 2d 1, 4 (Fla. 1973), we held that

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such a right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an

> overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

A question has arisen as to the scope of *Kluger*. Associated Industries strongly argues that *Kluger* protects both claims and defenses. It points to one sentence found in *Psychiatric Associates v. Siegel,* 610 So. 2d 419 (Fla. 1992). The *Siegel* Court wrote that "[t]he constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court." *Id.* at 424. Ignoring the inapposite nature of the context in which that statement was made, we can find no other cases from this Court that stand for the proposition that *Kluger* applies to affirmative defenses. Indeed, we look at *Hoffman* and *Kluger* together and find a telling insight as to the original (and current) meaning of our access-to-courts provision. *Hoffman* was decided on July 10, 1973. It abolished the longstanding affirmative defense of contributory negligence. *Kluger* was decided on July 11, 1973. It strains the limits of credibility to argue that *Kluger* prohibited the elimination of affirmative defenses just one day after this Court eliminated a longstanding affirmative defense.[22] Today we clarify that the constitutionality of the abolition of affirmative defenses is gauged by our due process jurisprudence. If applicable in the first place, we recede from any language in *Siegel* indicating that such abolition is governed by a *Kluger* analysis.

To recap, we hold that the provision abrogating affirmative defenses is facially constitutional. We do not address whether the provision will always survive a constitutional

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[22] We find further support for our position in *West*. As noted, the Court adopted the theory of strict liability in tort. At the same time, it refused to acknowledge the longstanding defense of contributory negligence in situations where the user fails to discover a defect and where the user fails to guard against the possibility of a defect. It should come as no surprise that there is no mention of *Kluger* in *West*.

due process attack as to its application. It would be inappropriate to speculate as to such application. "When such application shall be made it will be time enough to pronounce upon it." *J.W. Goldsmith, Jr. Grant Co. v. United States,* 254 U.S. 505, 512, 41 S. Ct. 189, 191, 65 L. Ed. 376 (1921). Further, any speculation as to the application of this provision would be flawed because we have no record containing facts, evidence, or expert opinions. Having now addressed the most contentious provision, we move on to the other challenged clauses.

Identification of Recipients

As part of the 1994 amendments to the Act, the legislature enacted a paragraph that allows the State to proceed without identifying each individual recipient of Medicaid payments. The relevant paragraph in the statute reads as follows:

> In any action under this subsection wherein the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.

§ 409.910(9)(a), Fla. Stat. (1995).

We find that this portion of the statute does in fact encroach upon due process guarantees of the Florida Constitution under article I, section 9. The State asserts that the challenged portion does not impact a defendant's ability to respond to a claim. We disagree. We can find no way in which this subsection would allow a defendant to challenge improper payments made to individual recipients. The paragraph clearly relieves the State of any obligation to reveal the identities of those recipients. Pro-

cedural due process, in our view, requires that a defendant be able to rebut a statutory presumption. In *Straughn v. K & K Land Management, Inc.*, 326 So. 2d 421, 424 (Fla. 1976), we stated: "The test for the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. *Second, there must be a right to rebut in a fair manner.*" (Emphasis added; citations omitted.) The current Act would prevent a defendant from demonstrating the impropriety of individual payments. Impropriety could be the result of fraud, misdiagnosis of the patient's condition, or unnecessary treatments. The defendant's inability to determine individual Medicaid recipients would also preclude that defendant from proving that its product was never used by the recipient. Hence, the statutory provision results in a conclusive presumption that every Medicaid payment is proper and necessitated by the defendant's product. It is illogical and unreasonable to call this a fair process. A defendant cannot rebut this presumption because there is no mechanism for determining to whom the payments were made. This type of conclusive presumption is violative of the due process provisions of our constitution, *see, e.g., State Farm Mut. Auto. Ins. Co. v. Malmberg*, 639 So. 2d 615 (Fla. 1994), and consequently the challenged paragraph must be stricken as unconstitutional.

Statute of Repose

The trial court held that the 1994 statutory amendment that abolishes the statute of repose is unconstitutional. The relevant portion of the 1994 amendment say that "[t]he defense of statute of repose shall not apply to any action brought under this section." § 409.910(12)(h), Fla. Stat. (1995). We have made it clear that the legislature cannot revive time-barred claims. In *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994), we stated: "*Once barred*, the legislature cannot subsequently declare that 'we change our mind on this type of claim' and then resurrect it.

Once an action is barred, a property right to be free from a claim was accrued." *Id.* at 68 (emphasis added). We find that *Wiley* controls. Therefore, the portion of the Act that abolishes the statute of repose defense is unconstitutional as violative of the due process clause of the Florida Constitution, but only as to claims which are already barred by the statute of repose. There is nothing to prevent the legislature from repealing a statute of repose. Therefore, the amendment can be constitutionally applied to claims not yet barred by the statute of repose when suit is filed.

Joinder of Claims and Liberal Construction

The act, in section 409.910(9), Florida Statutes (1995), provides for the joinder of multiple claims. It reads, in relevant part:

> In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to actions by the third parties or circumstances which involve common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding.

The trial court found that this provision infringed on the exclusive power of the judiciary to establish practice and procedure in Florida courts. We disagree under the circumstances of this case. As we have stated, the Act creates an independent cause of action. The challenged provision simply allows the State to aggregate its own claims arising from this new cause of action. The statutory joinder provision is consistent with court rules.[23] *See*

[23] Associated Industries places heavy reliance on *Avila South Condominium Association v. Kappa Corporation*, 347 So. 2d 599 (Fla. 1976). We find *Avila* to be inapposite. The *Avila* case addressed a statute that created a procedural vehicle for filing claims that was previously nonexistent. The provision at issue here simply traces the rules already created by this Court. In that the State

Fla. R. Civ. P. 1.110(g). Judicial efficiency is promoted when similar legal issues can be ruled upon in one proceeding. Further, we note that in condemnation actions it is not unusual to join as many as fifty to one hundred parcels in one proceeding. Consequently, we find no constitutional infirmity with the challenged joinder provision.

Next, we analyze the statutory directives indicating the proper construction of certain portions of the Act. First, the Act directs that courts should construe all common law theories of recovery in a manner conducive to effectuating the legislature's intent.[24] Second, the Act also contains a directive instructing the courts to liberally construe the evidence code on issues of causation and damages.[25] These two provisions are challenged as being violative of our separation-of-powers provision found in article II, section 3, of the Florida Constitution. We cannot agree that the Florida Constitution prohibits these types of statutory directives. We find them to be only directory. In fact, the chapter on declaratory judgments under which the appellees brought this suit contains the following provision:

> This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from the insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.

§ 86.101, Fla. Stat. (1995).

Declaratory judgment actions are well established in Florida jurisprudence. The directives regarding liberal construction have never been considered infirm in those actions. Likewise, we refuse to strike the aspirational language used in the Act.

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is filing claims in its own name, actions proceeding under the Act are not in the nature of a class action.

[24] § 409.910(1), Fla. Stat. (1995).

[25] § 409.910(9), Fla. Stat. (1995).

Market-Share Liability and Joint and Several Liability

Associated Industries challenges the concept of market-share liability as enacted by the 1994 amendments to the Act. The market-share provision reads, in pertinent part, as follows:

> In any action brought pursuant to this subsection wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market share theory, provided that the products involved are substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved in seeking recovery against each liable third party individually.

§ 409.910(9)(b), Fla. Stat. (1995).

In addition to this allowance for the use of market-share theory, the Act also instructs that all recoveries shall be joint and several.[26] We find no constitutional basis to prohibit the legislature from endorsing the use of a market-share theory for claims pursued under the Act. However, we find that it cannot be utilized with the concept of joint and several liability. In *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990), we expressly held: "The cornerstone of market share alternate liability is that if a defendant can establish its actual market share, it will not be liable under any circumstances for more than that percentage of the plaintiff's total injuries." (Quoting *George v. Parke-Davis*, 733 P.2d 507, 513 (Wash. 1987)). The State's ability to pursue a claim against any defendant for all damages under the theory of joint and several liability would frustrate the express holding in *Conley* that a defendant should be able to limit its liability to its market share. We find that the theories of market-share liability and joint and several liability are fundamentally incompatible. Consequently, we find that

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[26] § 409.910(1), Fla. Stat. (1995).

the two theories cannot be used together, and that to do so would violate due process. On the other hand, we find that either theory may be used independently of the other and, consequently, we need not strike any statutory language as unconstitutional as to this point.

Statistical Evidence

The Act allows the State to use statistical analysis in presenting its case. It is claimed that such an enactment by the legislature violates the separation-of-powers doctrine of article II, section 3 of the Florida Constitution. We interpret this provision to operate within the constraints of our rules of procedure and rules of evidence. The State retains the burden of proving its case within the bounds of these rules. Consequently, we find no constitutional infirmity.

Accrual of the Cause of Action

There appears to be confusion surrounding the point in time at which the State's action accrues and, accordingly, we find it important to address the conduct that gives rise to a claim by the State. The trial court explicitly ruled that attention should be focused on the "conduct of potential defendants." In the context of a dangerous product, under such a focus, a cause of action would presumptively accrue upon the consummation of a sale. We disagree with this approach and find that a cause of action under the Act accrues when the State makes a Medicaid payment to a recipient. Consequently, the State may proceed independently with its new cause of action to recover all payments made after the effective date of the 1994 act, specifically July 1, 1994.[27] Of course, the State may also pursue claims accruing prior to that date under the 1978 traditional subrogation action.

We reject any claim of insufficient notice. It has been the policy of this State to pursue reimbursement for

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[27] Ch. 94-251, § 7, Laws of Fla.

Medicaid expenses from available third-party resources since 1968. We find that notice is not an issue, particularly for claims accruing after 1978.

Applicability

The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the legislature. However, procedural provisions and modifications for the purpose of clarity are not so restricted. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994).

The 1994 amendments to the Act that have not been stricken qualify as substantive changes in the law. The State will have to file its claim under our current rules of procedure. Further, the current Act applies only to causes of action that accured after July 1, 1994.

Conclusion

Providing medical coverage for those in need is a legislative function. How the costs of such coverage are financed is also, primarily, a legislative decision. Many options exist by which the legislature can fund such medical services. Three such options are as follows: (1) the use of general revenue collected from all taxpayers; (2) the creation of a new cause of action with which to recoup medical expenditures from those product manufacturers that may have wrongfully caused the recipients' health problems; or (3) the enactment of a tax to be assessed to those products that cause the health problems, with the proceeds dedicated to funding health care.[28]

This choice is for the legislative branch and not the judicial branch. The wisdom of any choice made by the legislature is not the issue, and we are obligated to construe an act as constitutional if at all possible.

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[28] *See* Richard N. Pearson. *The Florida Medicaid Third-Party Liability Act*, 46 U. Fla. L. Rev. 609, 631-634 (1995).

Not all tort actions carry with them the same elements or affirmative defenses. The legislature must have the freedom to craft causes of action to meet society's changing needs. The United States Supreme Court has acknowledged this necessity and has tempered the legislative power of the states only with the rule against arbitrary or capricious actions. The State's action, as we have interpreted it, is neither arbitrary nor capricious. It is a rational response to a public need.

Finally, we present the following demonstration. Joint and several liability was established through the common law and later codified by the legislature. It allows a claimant to recover all damages from one of multiple defendants even though that particular defendant may be the least responsible defendant in the cause. Under the present section 768.81(3), Florida Statutes, a party who has more responsibility than the plaintiff may be made to pay all of the plaintiff's economic losses pursuant to the doctrine of joint and several liability. Hence, a party who is only one percent responsible for an accident, but who is jointly liable with a tortfeasor who is ninety-nine percent responsible, can be made to pay one hundred percent of the economic damages of a plaintiff who is zero percent at fault. We find that the Act simply recognizes the State as an entity analogous to the faultless plaintiff above. It allows the State to collect one hundred percent of the damages from a culpable third party even if another party might be considerably more culpable. The crucial distinction that must be highlighted is that the Act does not allow the recipient of Medicaid funds to benefit from a change in the basic scheme of joint and several liability. Instead, it merely treats the State as any other faultless plaintiff would already be treated under current Florida law. We can see no reason to find such a statutory scheme, with the exceptions herein stricken, facially unconstitutional. Accordingly, absent the clauses that we have stricken, the State may proceed in its efforts to recoup Medicaid expenditures from third-party tortfeasors under the Act. We

stress one final time, however, that challenges to the Act's application may be properly addressed in appropriate trial courts.

Therefore, for the reasons expressed, the judgment entered by the trial court is affirmed in part and reversed in part.

It is so ordered.

KOGAN, C.J., and ANSTEAD, J., concur.

WELLS, J., concurs with an opinion.

GRIMES, J., concurs in part and dissents in part with an opinion in which SHAW and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

WELLS, J., concurring.

I agree with the majority's thorough and excellent analysis. I write to express my concern about the breadth of the statute as it pertains to the abrogating of affirmative defenses.

The statute, by its language, is not limited to tobacco companies or to products or to any potential tortfeasors. The statute engulfs "any liable third party." The trial court ruled that the Governor's limitation of the statute by executive order to the tobacco industry was not binding. This ruling was not appealed. I agree that executive order has no future binding effect on the State pursuing recovery of Medicaid costs pursuant to the statute.

Therefore, in the future, the State could attempt to pursue recoveries from any tortfeasors, including individuals involved in automobile accidents and those involved in any kind of accident which results in the expenditure by the State of Medicaid costs. I agree with the majority that we should not speculate about such applications.

However, I do believe that constitutional applications of the statute will require the developing of a record demonstrating a rational basis for the State being entitled to recover Medicaid costs in instances in which the party whose conduct contributed to the incurring of those costs is either completely barred from recovery or whose entitlement to recovery is reduced by comparative negligence. The State contends that there is a rational basis for an application of the statute to manufacturers and distributors of tobacco products. This contention can only be evaluated on the basis of record facts and expert opinions.

On the other hand, it is difficult for me to conceive of a rational basis for the application of the statute to automobile or other types of accidents or to causes of action arising out of the use of products which do not have the peculiar and substantial Medicaid cost potential which the State asserts tobacco products have.

GRIMES, J., concurring in part and dissenting in part.

> "[H]istory reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was 'intended to secure the individual from the arbitrary exercise of the powers of government,' *Hurtado v. California*, 110 U.S. 516, 527 (1884)." *Daniels v. Williams*, 474 U.S. 327 (1986).

Collins v. City of Harker Heights, 503 U.S. 115, 127 n.10, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). By its 1994 amendments to the Medicaid Third-Party Liability Act, the State seeks to place a major portion of the cost of Medicaid upon third parties without regard to their constitutional rights. I cannot conclude that the end justifies the means.

I agree that the creation of the Agency for Health Care Administration did not violate the limitation on the number of departments of government set forth in article IV, section 6 of our constitution. Beyond that, I can accept very little of the majority's analysis of this far-reaching legislation.

The majority treats the statute as if it were limited to suits against tobacco companies. However, according to its plain language, the statute would apply to anyone who ever caused an injury to someone who was later treated for that injury by a Florida Medicaid provider. I know of no basis for the Governor's order limiting suits under this statute to those against tobacco companies. In any event, it could not possibly bind subsequent administrations. Furthermore, such an order flies directly in the face of *Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co.*, 175 So. 2d 39 (Fla. 1965), in which this Court held that a comparative negligence statute pertaining only to suits against railroad companies violated the equal protection clause because at that time all other

defendants were entitled to raise the defense of contributory negligence. Because the majority opinion addresses the various constitutional challenges under separate headings, will endeavor to follow the same format.

Abrogation of Affirmative Defenses

The statute purports to eliminate "comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party." While the State can now prosecute its claim, the defendant can no longer defend against it. This provision is unconstitutional for several reasons.

In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), this Court examined whether the state legislature is empowered to abolish a common law or statutory right of access in the face of article I, section 21 of our constitution, which guarantees the right of access to the courts. We held that where the right was embodied in a statute or was part of the common law of the State when our new constitution was adopted in 1968, the legislature cannot abolish such a right unless (1) the legislature provides a reasonable alternative to protect the party whose right is being abrogated, or (2) the legislature can show there is an overpowering public necessity for abolition of the right and there is no alternative method of meeting that necessity. *Id.* at 4.

Contributory negligence (later changed to comparative negligence) was a common law defense in 1968 when our new constitution was adopted. Clearly, the statute does not meet the first test of *Kluger* because it abolishes comparative negligence and other affirmative defenses without providing an alternative remedy to the defendant.

The statute also fails the second test. Ordinarily, when the legislature has sought to limit access to the courts, it has taken great care to delineate why an overpowering public necessity requires it. *E.g., University of Miami v. Echarte*, 618 So. 2d 189 (Fla.), *cert. denied*, 114 S. Ct.

304, 126 L. Ed. 2d 252 (1993). The legislature made no such effort in the enactment of the 1994 amendments. Clearly, federal law does not require the creation of any remedy to recoup Medicaid expenses, with the exception of the traditional remedies of subrogation and assignment. Moreover, no other state in the country has enacted a statute similar to the current statute. In any event, even if an overpowering public necessity for removing the defenses could be implied, there is an absence of any showing that there is no reasonable alternative for dealing with the Medicaid costs which are assumed to have been caused by tobacco. One obvious alternative would be to levy additional taxes upon the sale of tobacco in an amount sufficient to reimburse the State for expenses it perceives to have spent through Medicaid on tobacco-related illnesses. Yet, the legislature has not explained why this is not a viable alternative. Thus, the legislature's attempt to restrict access fails both tests of *Kluger*.

The majority dismisses consideration of the access clause of our constitution by the simple expedient of saying that it applies only to claims and not defenses. In so doing, it repudiates this Court's recent statement in *Psychiatric Associates v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992), that article I, section 21 applies to both claims and defenses. Moreover, the majority opinion undercuts the holding of *State ex rel. Pittman v. Stanjeski*, 562 So. 2d 673 (Fla. 1990), in which we reasoned that if a statute were construed to permit automatic entry of a judgment for delinquent support monies without giving the defendant an opportunity to present *defenses*, it would violate the right of access to courts. *Id.* at 679. *See also State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128 (Fla. 2d DCA 1995) (holding that right of access to courts applies to claims or defenses and declaring invalid a statute that impaired an insurance company's ability to defend itself by requiring advance payment of $100,000 before company could dispute liability), *approved*, 21 Fla. L. Weekly S102 (Fla. March 7, 1996).

Incomprehensibly, only plaintiffs and not defendants can now claim constitutional redress.

There are other compelling reasons why the abrogation of comparative negligence and other affirmative defenses with respect to the State's claims is unconstitutional. These may be best illustrated by example. Suppose John Smith bought an over-the-counter cold remedy manufactured by the Acme Drug Company. The package contained a warning that the cold remedy should not be taken by anyone suffering from diabetes, but the wording was arguably ambigous. Despite having had diabetes all of his life. Smith takes the medicine and becomes seriously ill. As a result of his treatment by Dr. Green, he incurs $1000 in medical expenses. If Smith sued Acme alleging that the inadequate warning caused him to incur medical expenses as well as other damages, Acme would be entitled to raise a comparative negligence defense that the warning was clear enough to alert Smith to the danger, thereby defeating or at least diminishing Smith's recovery.

However, suppose Smith qualified for Medicaid and because Dr. Green was a qualified Medicaid provider, Smith's medical bill was not paid by Smith but by Florida Medicaid. Under these circumstances, the 1994 Medicaid Third-Party Liability Act authorizes the State to sue Acme and strips Acme of its ability to defend on grounds of comparative negligence. The distinction between the two examples, which permit the State's claim against Acme to succeed whereas Smith's may not, has nothing to do with the circumstances of how the illness was caused but is based only upon the fortuity that Smith's medical bills were later covered by Medicaid. A law that presumes to measure the liability of a party based on such a consideration is completely arbitrary and violates due process. Whether a claim is Medicaid-eligible has no more relevance in measuring whether a party may raise an affirmative defense than the question of whether Smith has brown hair or blonde hair. Neither characteristic has any more bearing than the other as a rational basis for decid-

ing whether Acme Drug Company may plead comparative negligence.

The same reasoning would apply to the case where driver A is injured in an automobile intersection collision with driver B. Suppose the accident occured when driver A, who ran a red light, was hit by driver B, who was exceeding the speed limit at the time. In the normal case, driver A would sue for his damages, including medical expenses, and driver B would raise the defense of comparative negligence. However, if driver A happened to have his medical expenses paid by Medicaid, driver B would have no defense of comparative negligence against the State's suit to recover the medical expenses. To further illustrate the incongruity, if driver B were also injured and paid his own medical bills, his countersuit against driver A would be met by the defense of comparative negligence. The due process implications are overwhelming. As the United States Supreme Court said in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339, 129 L. Ed. 2d 336 (1994), the "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."

From another perspective, the statute also constitutes a denial of equal protection of the law. If one defendant sells a product or becomes involved in an accident which causes injury to another, he or she would be entitled to raise comparative negligence or any other affirmative defense to the lawsuit. Yet, another similarly situated defendant would not be entitled to raise affirmative defenses to the claim for the injured party's medical expenses if they were paid by Medicaid. The two hypothetical defendants' actions are exactly the same except that one is denied the equal protection of the law because of a fortuity that had nothing to do with his or her conduct.

Finally, how can it be that *only* when the State makes a claim, there can be no affirmative defenses? The State

has arrogated to itself a right that no other plaintiff can claim. The State's action in this respect is nothing more than a thinly veiled taking which violates the Fifth Amendment of the United States Constitution.

The majority's suggestion that the abolition of affirmative defenses is merely the equivalent of the modifications to other defenses that this Court has made from time to time is specious. Evolutionary modifications of specific defenses cannot be equated to the total abolition of affirmative defenses. Further, the majority overstates the holding of West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). In adopting the doctrine of strict liability, we specifically held that the defense of comparative negligence could be interposed to demonstrate the injured person's failure to exercise ordinary due care. *Id.* at 90. The lack of ordinary due care is exactly the defense that Acme Drug Company would be precluded from raising in a suit by the State to recover Medicaid payments made to Mr. Smith.

Unquestionably, the State has a right of subrogation to recover medical expenses from the tortfeasor. However, in subrogation, the claimant stands in the shoes of the injured party. In a suit against tobacco companies, the injured party would be the smoker whose medical expenses have been paid by Medicaid. This legislation is an unconstitutional attempt to strip the tobacco companies of the defenses against smokers' claims which have been successful in the past because of the health warnings on tobacco advertising and packages.

I cannot see how the abrogation of affirmative defenses can be said to be facially constitutional, yet subject to an as-applied analysis. In particular, there can be no rational basis for making distinctions as to which defendants might be entitled to raise affirmative defenses. Any effort to do so would violate the right of equal protection as explained in *Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co.* as well as other constitutional

protections. Moreover, upholding the facial constitutionality of most of the 1994 amendments but leaving open the possibility of as-applied attacks will spawn needless and expensive litigation.

Identification of Recipients

I agree with the majority's treatment of this issue.

Statute of Repose

I agree with the majority's treatment of this issue.

Joinder of Claims and Liberal Construction

Section 409.910(9). Florida Statutes (1995), reads in pertinent part:

> In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to actions by the third parties or circumstances which involve common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding.

I cannot agree that this provision does not infringe on the exclusive power of the judiciary to establish practice and procedure in Florida courts.

Article V, section 2(a) of our constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts." We have consistently held that statutes are limited to substantive matters and that the legislature may not prescribe practice and procedure. *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730 (Fla. 1991). To the extent that section 409.910 (9) can be said to establish procedure for class actions, it clearly violates the decision in *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1976). However, the majority suggests that this section more properly

deals with the joinder of causes of action and that its provisions are consistent with our court rules on joinder. I am not certain of this, but in any event, the fact that a statute may be consistent with our rules of procedure on joinder of causes of action is irrelevant. If it involves practice and procedure, the statute must be stricken even if the same practice and procedure is authorized by our rules.

Section 409.910(1), Florida Statutes (1995), provides that "[c]ommon law theories of recovery shall be liberally construed to accomplish" the intent of the statute. It is not unusual for statutes to specify that they should be liberally construed. However, this portion of the statute goes a giant step further in directing how common law theories of recovery should be construed. Thus, this portion of the statute also invades the province of the courts to establish practice and procedure. *See In re Alkire's Estate,* 144 Fla. 606, 623-25, 198 So. 475, 482-83 (1940) ("The weight to be given to evidence in judicial proceedings is not a matter for legislative regulation. . . . Statutes cannot direct or control the judicial judgment . . . .").

Market-Share Liability and Joint and Several Liability

I agree with the majority that theories of market-share liability and joint and several liability cannot be used together. I see no reason why one theory or the other could not be used in a single suit, provided their use is consistent with established case law on the subjects. Thus, market share liability would apply only where there was an inherent inability to identify the manfacturer of the product that caused the injury. *Conley v. Boyle Drug Co.,* 570 So. 2d 275 (Fla. 1990). Likewise where their conduct meets the established criteria for joint and several liability. *See Smith v. Department of Insurance,* 507 So. 2d 1080 (Fla. 1987) (joint and several liability applicable where defendants act in concert or where they commit separate acts which combine to produce a single injury).

Statistical Evidence

Section 409.910(9), Florida Statutes (1995), also provides that "the issue of causation and damages in any such action may be proven by use of statistical analysis." In attempting to dictate the manner in which cases may be proven, this statute clearly impinges upon the court's authority to regulate practice and procedure. However, based upon the majority's interpretation that it does not change the standard for the admissibility of statistical evidence, it should make no difference.

Accrual of the Cause of Action

I agree with the majority's treatment of this issue.

Applicability

I agree with the majority's treatment of this issue.

Conclusion

It may well be that the use of tobacco has resulted in inordinate medical expenses for which the State has paid Medicaid. However, the sale of tobacco has not been declared illegal and its manufacturers are entitled to just as much constitutional protection as anyone else.

As indicated above, I concur with the majority that there is no constitutional infirmity in the Agency's structure and in striking the provision which eliminated the necessity of identifying individual recipients. I also agree with the majority's treatment of the statute of repose issue, the market share and joint and several liability issue, the accrual of the cause of action issue, and the applicability of the law to causes of action accruing after July 1, 1994. I would strike as unconstitutional the provision abrogating affirmative defenses, the provision pertaining to joinder of claims and liberal construction, and the provision on statistical evidence.

I respectfully dissent.

SHAW and HARDING, JJ., concur.

APPENDIX B

[June 26, 1995]

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRUIT, IN AND
FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

Case No. 94-3128

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIC SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.,

Plaintiffs,

- VS -

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Defendants.

FINAL ORDER AND DECLARATORY JUDGMENT

This cause came on for hearing on June 16, 1995, on Plaintiffs' Motion for Summary Judgment. Plaintiffs filed an action seeking a declaration that the 1994 Amendments to the Medicaid Third-Party Liability Act, Section 4, Chapter 94-251, Laws of Florida (the "Amendments") violate the Constitutions of Florida and of the United States. At the hearing herein, the parties advised the Court that there are no disputed issues of material fact and that the action is ripe for final adjudication on all issues. Accordingly, by consent of the parties, the Court renders the following Final Order and Declaratory Judgment:

1. The Court finds as to Count I (the right to access Courts), Count V (due process), Count VI (title require-

ments) and Count VII (Federal Medicaid preemption) that relief to the Plaintiffs by Declaratory Judgment should be and the same is hereby denied. The Amendments do not violate the right of access to Courts under Article I, § 21 of the Florida Constitution, due process protections afforded by the Florida and United States Constitutions, the title requirements of Article III, § 6 of the Florida Constitution, or Federal Medical law. Accordingly, the Court finds for the State with respect to the issues raised by such Counts of the Complaint.

2. *Count II—Separation of powers.* Those portions of Section 409.910(9) of the Amendments dealing with joinder and identifying injured Medicaid recipients violate Article II, section 3 and Article V, section 2(a), of the Florida Constitution because they impermissibly infringe on the exclusive power of the judiciary to establish practice and procedure in Florida courts. *See Markert v. Johnston,* 367 So. 2d 1003 (Fla. 1978); *Avila S. Condominium Ass'n v. Kappa Corp.,* 347 So. 2d 599 (Fla. 1977). Those portions of Sections 409.910(1) and 409.910(9) dealing with the interpretation of common law theories of recovery and the evidence code violate Article II, section 3, and Article V, section 2(a) of the Florida Constitution for the same reason. That portion of section 409.910(9) providing that causation and damages may be proven by use of statistical evidence does not violate the separation of powers provisions of the Florida Constitution.

3. *Count III—Retroactivity.* Under Florida law, ,[a] substantive statute is presumed to operate prospectively rather than retrospectively unless the Legislature clearly expresses its intent that the statute is to operate retrospectively." *Alamo Rent-A-Car, Inc. v. Mancusi,* 632 So. 2d 1352, 1358 (Fla. 1994). Also, "[d]ue process considerations preclude retroactive application of a law that creates a substantive right." *Florida Patient's Comp. Fund* v. *Scherer,* 558 So. 2d 411 (Fla. 1990).

The Amendments create new substantive rights and impose new legal burdens and therefore, as a matter of

statutory construction and due process, the Amendments may only be applied prospectively—specifically, to conduct of potential defendants that occurred after the Amendments' effective date of July 1, 1994. The Amendments shall not be applicable to conduct or activities that occurred before July 1, 1994. *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 425 (Fla. 1994).

4. *Count IV—Due Process/Reviving Time-Barred Claims.* The Amendments' elimination of the statute of repose defense cannot apply to revive any claim already time-barred by the statue of repose. *Wiley v. Roof,* 641 So. 2d 66 (Fla. 1994).

5. *Count VIII—Constitutionality of the Agency for Health Care Administration.* Article IV, Section 6 of the Florida Constitution requires all functions of the executive branch to be allotted to twenty-five departments. The Agency for Health Care Administration ("AHCA") was created "within" the Department of Business and Professional Regulation ("DBPR") but AHCA is not subject to the "control, supervision, or direction" of DBPR. § 20.42, Fla. Stat. (1993). A 'function" cannot be "allotted" to a department if the department has no control over that function. Since DBPR has no control or supervision over AHCA, AHCA is unconstitutionally structured in violation of the 25 department limit of Article IV, § 6 of the Florida Constitution.

6. It is THEREFORE, ORDERED and ADJUDGED that Plaintiffs' Motion for Summary Judgment on Counts III, IV and VIII is granted and as to Count I granted in part. It is further ORDERED and ADJUDGED that Summary Judgment is granted against Plaintiffs on Counts I, V, VI, and VII.

DONE and ORDERED at Tallahassee Leon County, Florida, this 26 day of June, 1995.

/s/ Judge F. E. Steinmeyer
JUDGE F. E. STEINMEYER

APPENDIX C

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

Case No. 94-3128

JUDGE STEINMEYER

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.,
Plaintiffs,

v.

STATE OF FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., AND NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC.

This cause came before the Court for hearing on May 12, 1995 on Defendants' Motion for Summary Judgment. Upon full consideration of the oral argument of counsel, and all pleadings, affidavits, memoranda, briefs, and relevant authorities with respect thereto, the Court hereby finds, concludes, and rules as follows:

1. The Governor lacks the authority to limit the application of Ch. 94-251, Laws of Florida, "the Medicaid

Third-Party Liability Act," solely to "those responsible for disease and death caused by tobacco products" by issuing an executive order for entering into a stipulation. Such actions by the Governor would effectively amend the statute—a power specifically reserved for the legislature under the Florida Constitution.

2. Plaintiffs, Publix Supermarkets, Inc., Associated Industries of Florida, Inc., and the National Association of Convenience Stores, Inc., or their constituent members, manufacture, distribute, or otherwise sell products in the State of Florida. These plaintiffs have a bona fide, actual practical need to a declaration as to the constitutionality of the Medicaid Third-Party Liability Act and satisfy the test set out in *May v. Holly*, 59 So.2d 636, 639 (Fla. 1952) and subsequent decisions, as to standing and jurisdiction. Accordingly, these plaintiffs have standing to pursue this action, and this Court has jurisdiction to entertain the suit.

It is therefore ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is hereby DENIED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 23rd day of May, 1995.

/s/ F. E. Steinmeyer
F. E. STEINMEYER
Circuit Judge

APPENDIX D

Friday, September 6, 1996

SUPREME COURT OF FLORIDA

Case No. 86,213

AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*,
Appellants/Cross-Appellees,

v.

ASSOCIATED INDUSTRIES OF FLORIDA, INC., *et al.*,
Appellees/Cross-Appellants.

Circuit Court No. 94-3128 (Leon)
District Court of Appeal, 1st District—No. 95-2578

Appellees/Cross-Appellants' Motion for Rehearing filed in the above cause is hereby denied.

KOGAN, C.J., OVERTON, WELLS and ANSTEAD, JJ., concur.

SHAW, GRIMES and HARDING, JJ., dissent

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*

v.

ASSOCIATED INDUSTRIES OF FLORIDA, INC., *et al.*

Case No.: 86,213

Your Case No.: 94-3128
DCA Case No.: 95-2578

The attached opinion was rendered on: June 27, 1996.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 6th day of September, 1996.

/s/ [Illegible]
Clerk of the Supreme Court
of Florida

[SEAL]

APPENDIX E

§ 409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable.—

(1) It is the intent of the Legislature that Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are available, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources: such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources. Common law theories of recovery shall be liberally construed to accomplish this intent.

(2) This section may be cited as the "Medicaid Third-Party Liability Act."

(3) Third-party benefits for medical services shall be primary to medical assistance provided by Medicaid.

(4) After the department has provided medical assistance under the Medicaid program, it shall seek recovery of reimbursement from third-party benefits to the limit of

legal liability and for the full amount of third-party benefits, but not in excess of the amount of medical assistance paid by Medicaid, as to:

(a) Claims for which the department has a waiver pursuant to federal law; or

(b) Situations in which a third party is liable and the liability or benefits available are discovered either before or after medical assistance has been provided by Medicaid.

(5) An applicant, recipient, or legal representative shall inform the department of any rights the applicant or recipient has to third-party benefits and shall inform the department of the name and address of any person that is or may be liable to provide third-party benefits. When the department provides, pays for, or becomes liable for medical services provided by a hospital, the recipient receiving such medical services or his legal representative shall also provide the information as to third-party benefits, as defined in this section, to the hospital, which shall provide notice thereof to the department in a manner specified by the department.

(6) When the department provides, pays for, or becomes liable for medical care under the Medicaid program, it has the following rights, as to which the department may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:

(a) The agency has a cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient.

(b) The department is automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be re-

duced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the department from any and all third-party benefits. Equities of a recipient, his legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the department as to its subrogation rights granted under this paragraph.

(c) By applying for or accepting medical assistance, an applicant, recipient, or legal representative automatically assigns to the department any right, title, and interest such person has to any third-party benefit, excluding any Medicare benefit to the extent required to be excluded by federal law.

1. The assignment granted under this paragraph is absolute, and vests legal and equitable title to any such right in the department, but not in excess of the amount of medical assistance provided by the department.

2. The department is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title free and clear of latent equities in a third person. Equities of a recipient, his legal representative, his creditors, or health care providers shall not defeat or reduce recovery by the department as to the assignment granted under this paragraph.

3. By accepting medical assistance, the recipient grants to the department the limited power of attorney to act in his name, place, and stead to perform specific acts with regard to third-party benefits, his assent being deemed to have been given, including:

a. Endorsing any draft, check, money order, or other negotiable instrument representing third-party benefits that are received on behalf of the recipient as a third-party benefit.

b. Compromising claims to the extent of the rights assigned.

(d) The department is entitled to, and has, an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness for which a third party is or may be liable, upon the collateral, as defined in s. 409.901.

1. The lien attaches automatically when a recipient first receives treatment for which the department may be obligated to provide medical assistance under the Medicaid program. The lien is perfected automatically at the time of attachment.

2. The department is authorized to file a verified claim of lien. The claim of lien shall be signed by an authorized employee of the department, and shall be verified as to the employee's knowledge and belief. The claim of lien may be filed and recorded with the clerk of the circuit court in the recipient's last known county of residence or in any county deemed appropriate by the department. The claim of lien, to the extent known by the department, shall contain:

a. The name and last known address of the person to whom medical care was furnished.

b. The date of injury.

c. The period for which medical assistance was provided.

d. The amount of medical assistance provided or paid, or for which Medicaid is otherwise liable.

e. The names and addresses of all persons claimed by the recipient to be liable for the covered injuries or illness.

3. The filing of the claim of lien pursuant to this section shall be notice thereof to all persons.

4. If the claim of lien is filed within 1 year after the later of the date when the last item of medical care relative to a specific covered injury or illness was paid, or the

date of discovery by the department of the liability of any third party, or the date of discovery of a cause of action against a third party brought by a recipient or his legal representative, record notice shall relate back to the time of attachment of the lien.

5. If the claim of lien is filed after 1 year after the later of the events specified in subparagraph 4, notice shall be effective as of the date of filing.

6. Only one claim of lien need be filed to provide notice as set worth in this paragraph and shall provide sufficient notice as to any additional or after-paid amount of medical assistance provided by Medicaid for any specific covered injury or illness. The department may, in its discretion, file additional, amended, or substitute claims of lien at any time after the initial filing, until the department has been repaid the full amount of medical assistance provided by Medicaid or otherwise has released the liable parties and recipient.

7. No release or satisfaction of any cause of action, suit, claim, counterclaim, demand, judgment, settlement, or settlement agreement shall be valid or effectual as against a lien created under this paragraph, unless the department joins in the release or satisfaction or executes a release of the lien. An acceptance of a release or satisfaction of any cause of action, suit, claim, counterclaim, demand, or judgment and any settlement of any of the foregoing in the absence of a release or satisfaction of a lien created under this paragraph shall prima facie constitute an impairment of the lien, and the department is entitled to recover damages on account of such impairment. In an action on account of impairment of a lien, the department may recover from the person accepting the release or satisfaction or making the settlement the full amount of medical assistance provided by Medicaid. Nothing in this section shall be construed as creating a lien or other obligation on the part of an insurer which in good faith has paid a claim pursuant to its contract

without knowledge or actual notice that the department has provided medical assistance for the recipient related to a particular covered injury or illness. However, notice of knowledge that an insured is, or has been a Medicaid recipient within 1 year from the date of service for which a claim is being paid creates a duty to inquire on the part of the insurer as to any injury or illness for which the insurer intends or is otherwise required to pay benefits.

8. The lack of a properly filed claim of lien shall not affect the department's assignment or subrogation rights provided in this subsection, nor shall it affect the existence of the lien, but only the effective date of notice as provided in subparagraph 5.

9. The lien created by this paragraph is a first lien and superior to the liens and charges of any provider, and shall exist for a period of 7 years, if recorded, after the date of recording; and shall exist for a period of 7 years after the date of attachment, if not recorded. If recorded, the lien may be extended for one additional period of 7 years by rerecording the claim of lien within the 90-day period preceding the expiration of the lien.

10. The clerk of the circuit court for each county in the state shall endorse on a claim of lien filed under this paragraph the date and hour of filing and shall record the claim of lien in the official records of the county as for other records received for filing. The clerk shall receive as his fee for filing and recording any claim of lien or release of lien under this paragraph the total sum of $2. Any fee required to be paid by the department shall not be required to be paid in advance of filing and recording, but may be billed to the department after filing and recording of the claim of lien or release of lien.

11. After satisfaction of any lien recorded under this paragraph, the department shall, within 60 days after satisfaction, either file with the appropriate clerk of the circuit court or mail to any appropriate party, or counsel

representing such party, if represented, a satisfaction of lien in a form acceptable for filing in Florida.

(7) The department shall recover the full amount of all medical assistance provided by Medicaid on behalf of the recipient to the full extent of third-party benefits.

(a) Recovery of such benefits shall be collected directly from:

1. Any third party;

2. The recipient or legal representative, if he has received third-party benefits;

3. The provider of a recipient's medical services if third-party benefits have been recovered by the provider; notwithstanding any provision of this section, to the contrary, however, no provider shall be required to refund or pay to the department any amount in excess of the actual third-party benefits received by the provider from a third-party payor for medical services provided to the recipient; or

4. Any person who has received the third-party benefits.

(b) Upon receipt of any recovery or other collection pursuant to this section, the department shall distribute the amount collected as follows:

1. To itself, an amount equal to the state Medicaid expenditures for the recipient plus any incentive payment made in accordance with paragraph (14)(a).

2. To the Federal Government, the federal share of the state Medicaid expenditures minus any incentive payment made in accordance with paragraph (14)(a) and federal law, and minus any other amount permitted by federal law to be deducted.

3. To the recipient, after deducting any known amounts owed to the department for any related medical assistance or to health care providers, any remaining

amount. This amount shall be treated as income or resources in determining eligibility for Medicaid.

(8) The department shall require an applicant or recipient, or the legal representative thereof, to cooperate in the recovery by the department of third-party benefits of a recipent and in establishing paternity and support of a recipient child born out of wedlock. As a minimal standard of cooperation, the recipient or person able to legally assign a recipient's rights shall:

(a) Appear at an office designated by the department to provide relevant information or evidence.

(b) Appear as a witness at a court or other proceeding.

(c) Provide information, or attest to lack of information, under penalty of perjury.

(d) Pay to the department any third-party benefit received.

(e) Take any additional steps to assist in establishing paternity or securing third-party benefits, or both.

(f) Paragraphs (a)-(e) notwithstanding, the department shall have the discretion to waive, in writing, the requirement of cooperation for good cause shown and as required by federal law.

(9) In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to actions by the third parties or circumstances which involve common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding. In any action brought under this subsection, the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages. The issue of causation and damages in any such action may be proven by use of satistical analysis.

(a) In any action under this subsection wherein the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.

(b) In any action brought pursuant to this subsection wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market share theory, provided that the products involved ar substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved in seeking recovery against each liable third party individually.

(10) The department shall deny or terminate eligibility for any applicant or recipient who refuses to cooperate as required in subsection (8), unless cooperation has been waived in writing by the department as provided in paragraph (8(f). However, any denial or termination of eligibility shall not reduce medical assistance otherwise payable by the department to a provider for medical care provided to a recipient prior to denial or termination of eligibility.

(11) An applicant or recipient shall be deemed to have provided to the department the authority to obtain and release medical information and other records with respect to such medical care, for the sole purpose of obtaining reimbursement for medical assistance provided by Medicaid.

(12) The department may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.

(a) If either the recipient, or his legal representative, or the department brings an action against a third party, the recipient, or his legal representative, or the department, or their attorneys, shall, within 30 days after filing the action, provide to the other written notice, by personal delivery or registered mail, of the action, the name of the court in which the case is brought, the case number of such action, and a copy of the pleadings, if an action is brought by either the department, or the recipient or his legal representative, the other may, at any time before trial on the merits, became a party to, or shall consolidate his action with the other if brought independently. Unless waived by the other, the recipient, or his legal representative, or the department shall provide notice to the other of the intent to dismiss at least 21 days prior to voluntary dismissal of an action against a third party. Notice to the department shall be sent to an address set forth by rule. Notice to the recipient or his legal representative, if represented by an attorney, shall be sent to the attorney, and, if not represented, then to the last known address of the recipient or his legal representative. The provisions of this subsection shall not apply to any actions brought pursuant to subsection (9), and in any such action, no notice to recipients is required, and the recipients shall have no right to become a party to any action brought under such subsection.

((b) An action by the department to recover damages in tort under this subsection, which action is derivative of the rights of the recipient or his legal representaitve, shall not constitute a waiver of sovereign immunity pursuant to s. 768.14.

(c) In the event of judgment, award, or settlement in a claim or action against a third party, the court shall order the segregation of an amount sufficient to repay the department's expeditures for medical assistance, plus any other amounts permitted under this section, and shall order such amounts paid directly to the department.

(d) No judgment, award, or settlement in any action by a recipient or his legal representative to recover damages for injuries or other third-party benefits, when the department has an interest, shall be satisfied without first giving the department notice and a reasonable opportunity to file and satisfy its lien, and satisfy its assignment and subrogation rights or proceed with any action as permitted in this section.

(e) Except as otherwise provided in this section, notwithstanding any other provision of law, the entire amount of any settlement of the recipient's action or claim involving third-party benefits, with or without suit, is subject to the department's claims for reimbursement of the amount of medical assistance provided and any lien pursuant thereto.

(f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his legal representative is a party and in which the amount of any judgment, award, or settlement from third-party benefits, excluding medical coverage as defined in subparagraph 4, after reasonable costs and expenses of litigation, is an amount equal to or less than 200 percent of the amount of medical assistance provided by Medicaid less any medical coverage paid or payable to the department, then distribution of the amount recovered shall be as follows:

1. Any fee for services of an attorney retained by the recipient or his legal representative shall not exceed an amount equal to 25 percent of the recovery, after reasonable costs and expenses of litigation, from the judgment, award, or settlement.

2. After attorney's fees, two-thirds of the remaining recovery shall be designated for past medical care and paid to the department for medical assistance provided by Medicaid.

3. The remaining amount from the recovery shall be paid to the recipient.

4. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

(g) In the event that the recipient, his legal representative, or his estate brings an action against a third party, notice of institution of legal proceedings, notice of settlement, and all other notices required by this section or by rule shall be given to the department, in Tallahassee, in a manner set forth by rule. All such notices shall be given by the attorney retained to assert the recipient's or legal representative's claim, or, if no attorney is retained, by the recipient, his legal representative, or his estate.

(h) Except as otherwise provided in this section, actions to enforce the rights of the department under this section shall be commenced within 5 years after the date a cause of action accrues, with the period running from the later of the date of discovery by the department of a case filed by a recipient or his legal representative, or of discovery of any judgment, award, or settlement contemplated in this section, or of the provision of medical assistance to a recipient. Each item of expense provided by the agency shall be considered to constitute a separate cause of action for purposes of this subsection. The defense of repose shall not apply to any action brought under this section by the agency. Nothing in this paragraph affects or prevents a proceeding to enforce a lien during the existence of the lien as set forth in subparagraph (6)(c)9.

(i) Upon the death of a recipient, and within the time prescribed by ss. 733.702 and 733.710, the department, in additon to any other available remedy, may file a claim against the estate of the recipient for the total amount

of medical assistance provided by Medicaid for the benefit of the recipient. Claims so filed shall take priority as class 3 claims as provided by s. 733.707)1)(c). The filing of a claim pursuant to this paragraph shall neither reduce nor diminish the general claims of the department pursuant to s. 409.345, except that the department shall not receive double recovery for the same expenditure. Claims under this paragraph shall be superior to those under s. 409.345. The death of the recipient shall neither extinguish nor diminish any right of the department to recover third-party benefits from a third party or provider. Nothing in this paragraph affects or prevents a proceeding to enforce a lien created pursuant to this section as defined in subsection (16).

(13) No action taken by the department shall operate to deny the recipient's recovery of that portion of benefits not assigned or subrogated to the department, or not secured by the department's lien. The department's rights of recovery created by this section, however, shall not be limited to some portion of recovery from a judgment, award, or settlement. Only the following benefits are not subject to the rights of the department: benefits not related in any way to a covered injury or illness; proceeds of life insurance coverage on the recipient; proceeds of insurance coverage, such as coverage for property damage, which by its terms and provisions cannot be construed to cover personal injury, death, or a covered injury or illness; proceeds of disability coverage for lost income; and recovery in excess of the amount of medical benefits provided by Medicaid after repayment in full to the department.

(14) No action of the recipient shall prejudice the rights of the department under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by

the recipient or his legal representative shall impair the department's rights. However, in a structured settlement, no settlement agreement by the parties shall be effective or binding against the department for benefits accrued without the express written consent of the department or an appropriate order of a court having personal jurisdiction over the department.

(15) The department is authorized to enter into agreements to enforce or collect medical support and other third-party benefits.

(a) If a cooperative agreement is entered into with any agency, program, or subdivision of the state, or any agency, program, or legal entity of or operated by a subdivision of the state, or with any other state, the department is authorized to make an incentive payment of up to 15 percent of the amount actually collected and reimbursed to the department, to the extent of medical assistance paid by Medicaid. Such incentive payment is to be deducted from the federal share of that amount, to the extent authorized by federal law. The department may pay such person an additional percentage of the amount actually collected and reimbursed to the department as a result of the efforts of the person, but no more than a maximum percentage established by the department. In no case shall the percentage exceed the lesser of a percentage determined to be commercially reasonable or 15 percent, in addition to the 15-percent incentive payment, of the amount actually collected and reimbursed to the department as a result of the efforts of the person under contract.

(b) If an agreement to enforce or collect third-party benefits is entered into by the department with any person other than those described in paragraph (a), including any attorney retained by the department who is not an employee or agent of any person named in paragraph (a), then the department may pay such person a percentage of the amount actually collected and reimbursed

to the department as a result of the efforts of the person, to the extent of medical assistance paid by Medicaid, in no case shall the percentage exceed a maximum established by the department, which shall not exceed the lesser of a percentage determined to be commercially reasonable or 30 percent of the amount actually collected and reimbursed to the department as a result of the efforts of the person under contract.

(c) An agreement pursuant to this subsection may permit reasonable litigation costs or expenses to be paid from the department's recovery to a person under contract with the department.

(d) Contingency fees and costs incurred in recovery pursuant to an agreement under this subsection may, for purposes of determining state and federal share, be deemed to be administrative expenses of the state. To the extent permitted by federal law, such administrative expenses shall be shared with, or fully paid by, the Federal Government.

(16) Insurance and other third-party benefits may not contain any term or provision which purports to limit or exclude payment or provisions of benefits for an individual if the individual is eligible for, or a recipient of, medical assistance from Medicaid, and any such term or provision shall be void as against public policy.

(17) Any transfer or encumbrance of any right, title, or interest to which the department has a right pursuant to this section, with the intent, likelihood, or practical effect of defeating, hindering, or reducing recovery by the department for reimbursement of medical assistance provided by Medicaid, shall be deemed to be a fraudulent conveyance, and such transfer or encumbrance shall be void and of no effect against the claim of the department, unless the transfer was for adequate consideration and the proceeds of the transfer are reimbursed in full to the department, but not in excess of the amount of medical assistance provided by Medicaid.

(18) A recipient or his legal representative or any person representing, or acting as agent for, a recipient or his legal representative, who has notice, excluding notice charged solely by reason of the recording of the lien pursuant to paragraph (6)(c), or who has actual knowledge of the department's rights to third-party benefits under this section, who receives any third-party benefit or proceeds therefrom for a covered illness or injury is required either to pay the department the full amount of the third-party benefits, but not in excess of the total medical assistance provided by Medicaid, or to place the full amount of the third-party benefits in a trust account for the benefit of the department pending judicial or administrative determination of the department's right thereto. Proof that any such person had notice or knowledge that the recipient had received medical assistance from Medicaid, and that third-party benefits or proceeds therefrom were in any way related to a covered illness or injury for which Medicaid had provided medical assistance, and that any such person knowingly obtained possession or control of, or used, third-party benefits or proceeds and failed either to pay the department the full amount required by this section or to hold the full amount of third-party benefits or proceeds in trust pending judicial or administrative determination, unless adequately explained, gives rise to an inference that such person knowingly failed to credit the state or its agent for payments received from social security, insurance, or other sources pursuant to s. 409.325(4)(b), and acted with the intent set forth in s. 812.014(1).

(a) The department is authorized to investigate and to request appropriate officers or agencies of the state to investigate suspected criminal violations or fraudulent activity related to third-party benefits, including, without limitation, ss. 409.325 and 812.014. Such requests may be directed, without limitation, to the Medicaid Fraud Control Unit of the Office of the Department of Legal Affairs, to the Attorney General, or to any state attorney.

Pursuant to s. 409.913, the Attorney General has primary responsibility to investigate and control Medicaid fraud.

(b) In carrying out duties and responsibilities related to Medicaid fraud control, the department may subpoena witnesses or materials within or outside the state and, through any duly designated employee, administer oaths and affirmations and collect evidence for possible use in either civil or criminal judicial proceedings.

(c) All information obtained and documents prepared pursuant to an investigation of a Medicaid recipient, the recipient's legal representative, or any other person relating to an allegation of recipient fraud or theft is confidential and exempt from the provisions of s. 119.07(1):

1. Until such time as the department takes final agency action;

2. Until such time as the Auditor General refers the case for criminal prosecution;

3. Until such time as an indictment or criminal information is filed by a state attorney in a criminal case, or

4. At all times if otherwise protected by law.

This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(19) In cases of suspected criminal violations or fraudulent activity, on the part of any person including a liable third party, the department is authorized to take any civil action permitted at law or equity to recover the greatest possible amount, including without limitation, treble damages under s. 772.73, in any action in which the recipient has no right to intervene, or does not exercise his right to intervene, any amounts recovered under this subsection shall be the property of the agency, and the recipient shall have no right or interest in such recovery.

(20) In recovering any payments in accordance with this section, the department is authorized to make appropriate settlements.

(21) Notwithstanding any provision in this section to the contrary, the department shall not be required to seek reimbursement from a liable third party on claims for which the department determines that the amount it reasonably expects to recover will be less than the cost of recovery, or that recovery efforts will otherwise not be cost-effective.

(22) Entities providing health insurance as defined in s. 624.603, and health maintenance organizations and prepaid health clinics as defined in chapter 641, shall provide such seconds and information as are necessary to accomplish the purpose of this section, unless such requirement results in an unreasonable burden.

(a) The secretary of the department and the insurance Commissioner shall enter into a cooperative agreement for requesting and obtaining information necessary to effect the purpose and objective of this section.

1. The department shall request only that information necessary to determine whether health insurance as defined pursuant to s. 624.603, or those health services provided pursuant to chapter 641, could be should be, or have been claimed and paid with respect to items of medical care and services furnished to any person eligible for services under this section.

2. All information obtained pursuant to subparagraph 1, is confidential and exempt from s. 119.07(1). This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

3. The cooperative agreement or rules adopted under this subsection may include financial arrangements to reimburse the reporting entities for reasonable costs or a portion thereof incurred in furnishing the requested information. Neither the cooperative agreement nor the rules shall require the automation of manual processes to provide the requested information.

(b) The department and the Department of Insurance jointly shall adopt rules for the development and administration of the cooperative agreement. The rules shall include the following:

1. A method for identifying those entities subject to furnishing information under the cooperative agreement.

2. A method for furnishing requested information.

3. Procedures for requesting exemption from the cooperative agreement based on an unreasonable burden to the reporting entity.

(23) The department is authorized to adopt rules to implement the provisions of this section and federal requirements.

United States Constitution, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

STATE OF FLORIDA

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 95-109

WHEREAS Florida's business, health care and insurance communities have to pay for the increased costs of health care and lost employee productivity resulting from sickness and death caused by cigarette smoking, at a cost to the Florida economy of $4.4 billion in direct and indirect costs each year ($3 billion was indirect costs for excessive sick leave, disability, forfeited future earnings for those that die prematurely, and $1.4 billion represents direct health care costs for hospitalization, physician fees, nursing home care, medications and other charges), and at a cost of the lives of over 28,000 Floridians annually, 77 deaths each day. (Dr. Joyner Sims, Ph.D., Journal Florida Medical Association, Vol. 81, No. 12, December 1994), and

WHEREAS, tobacco is addictive and known to destroy health and cause death when used as directed, and

WHEREAS, the State of Florida has an obligation to use taxpayer-provided resources in an efficient and expedient manner, and

WHEREAS, the Florida Legislature found it compelling to seek reimbursement of state tax dollars on behalf of Medicaid recipients when third parties are liable, and thereby enacted the Medicaid Third Party Liability Act in 1970, and

WHEREAS, the increases in costs to treat Medicaid recipients for smoking related illnesses and diseases has placed a significant burden on the State of Florida, and

WHEREAS, these escalating costs to treat Medicaid recipients for tobacco-related illnesses and diseases ulti-

mately affect the states efficient use of tax dollars to support other public services, and

WHEREAS, the magnitude of this compelling financial problem demands immediate and dramatic actions, and

WHEREAS, in 1994, the Florida Legislature passed Chaper 94-251, Laws of Florida, which provides that certain legal defenses are not applicable in a suit by the State of Florida for the recovery of public monies paid for medical assistance to Medicaid recipients as a result of diseases or injuries caused by a third party, and

WHEREAS, these defenses have historically been raised by tobacco interests in defending against lawsuits to recover public monies spent for tobacco related health care, and

WHEREAS, the State of Florida Agency for Health Care Administration, through the Attorney General with co-counsel of an affiliation of private attorneys under contingent fee contract to the state, filed its lawsuit seeking to recover more than $1 billion dollars Florida taxpayers have spent on publicly paid health care costs associated with the manufacture of tobacco products, and

WHEREAS, those responsible for the availability of these harmful products have alleged that the statute allowing the state to sue them could be used against those who manufacture or sell other products which are not inherently dangerous when used as directed, and

WHEREAS, it is the intent of the Governor as Chief Executive of the State of Florida to use the provisions of Chapter 94-251, Laws of Florida, only against the manufacture of tobacco products to recover the monies directly spent for medicaid on conditions caused by the use of tobacco products, and

WHEREAS, it is within the supervisory powers of the Governor to instruct his agencies with policy directives which the Governor believes to be in the best interest of the State of Florida,

NOW, THEREFORE, I, LAWTON CHILES, Governor of Florida, in obedience to my solemn constitutional duty "to take care that the laws be faithfully executed", and pursuant to the Constitution and laws of the State of Florida, do hereby promulgate the following Executive Order effective immediately:

> The Agency for Health Care Administration, in particular, and all gubernatorial agencies in general, are hereby directed to refrain from applying the provisions of Chapter 94-251, Laws of Florida, against any defendants other than those responsible for disease and death caused by tobacco products and those responsible for disease and death caused by the sale and consumption of illegal drugs.

[SEAL]

> IN TESTIMONY WHEREOF, I have hereunto set my hand and have caused the Great Seal of Florida to be affixed at Tallahasse, the Capitol, this 28th day of March, 1995.
>
> /s/ Lawton Chiles
> Governor

/s/ Sandra B. Morthem
Secretary of State

No. 96-915

Supreme Court, U.S.
FILED
FEB 6 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Associated Industries of Florida, Inc. and
Philip Morris, Inc.

Petitioners,

v.

Agency For Health Care Administration, State of
Florida Department of Business and Professional
Regulation, and State of Florida

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Florida, the Agency for Health Care Administration, and the Department of Business and Professional Regulation respectfully submit this brief in opposition to the petition for writ of certiorari filed in this case by Associated Industries of Florida, Inc. and Philip Morris.

STATEMENT OF THE CASE

This case presents the question of the facial constitutionality of Chapter 94-251, Section 4, Laws of Florida ("1994 Amendments"), which amended Florida's Medicaid Third-Party Liability Act, Section 409.910, Fla. Stat. Petitioners' description of the 1994 Amendments and their legislative history is predictably partisan and one-sided. Far from being radical or unprecedented, the Amendments are only the latest statutes in a long series of efforts by the Florida legislature to carry out its federally mandated duty to recoup Medicaid payments from liable third parties.

1. Florida law has long recognized the rules of primary conduct that put a manufacturer on notice that it may be held accountable for all damages caused by its defective products. Over three decades ago, in *Green v. American Tobacco Co.*, 154 So.2d 169, 173 (Fla. 1963), the Florida Supreme Court declared:

> There exists . . . no real alternative and no valid objection to this distribution of the burden [to the manufacturer], if the public health is to be protected in

> any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

2. Under the Social Security Act, States are obligated to "take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the [state Medicaid] plan arising out of injury, disease or disability" and "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25). In 1970, the Florida Division of Family Services became the unit of the Florida government responsible for pursuing Medicaid third-party liability claims. *See* Ch. 69-268, § 1, Laws of Fla., and Ch. 69-106, § 19, 35, Laws of Fla.

In 1978, the Florida Medicaid Third-Party Liability Act, Ch. 78-433, Laws of Fla., statutorily subrogated the rights of individual Medicaid recipients to the Department of Health and Rehabilitative Services ("HRS") to "recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the [Medicaid] recipient." § 409.266, Fla. Stat. (1978).

To strengthen the State's ability to recover Medicaid expenses from culpable tortfeasors, in 1982 the Act was again amended to require assignment of Medicaid claims to the State and to establish a lien on any third-party recovery. Ch. 82-159, Laws of Fla.

3. In 1990, the Act was comprehensively revised to facilitate the State's recoupment of Medicaid payments from liable third parties. At that time, the Legislature clearly and unequivocally expressed: "It is the intent of the Legislature that

Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients." § 409.2665(1), Fla. Stat. (Supp. 1990).[1] Notably, petitioners in this case have never challenged *any* of the provisions of the 1990 statute, under either the Florida or U.S. Constitutions.

The Florida Supreme Court recognized that the 1990 changes were "major amendments" that "strengthen[ed] the State's ability to recover funds expended for Medicaid costs." Pet. App. 3a. For example, a third party — the potential defendant in any action brought under the Act — was defined as:

> an individual, entity, or program, excluding Medicaid, that is, may be, or could be, should be, or has been liable for all of the cost of medical services related to any medical assistance covered by Medicaid.

§ 409.2665(3)(p), Fla. Stat. (Supp. 1990). As the Florida Supreme Court recognized, "[c]ertainly this broad definition of third parties covers tortfeasors that caused a Medicaid recipient's health problems." Pet. App. 14a.

In addition, the Supreme Court identified "significant changes to the State's traditional subrogation action" wrought by the 1990 Amendments. *Id.* at 15a. Contrary to petitioners' assertions that until 1994 the State had no independent right of recovery and simply stood in the shoes of the Medicaid recipient, under the 1990 legislation the State was afforded *four* statutorily recognized methods of recovery:

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1 The 1990 Amendments were codified at Section 409.2665, Florida Statutes and subsequently renumbered in 1991 at Section 409.910, Florida Statutes.

> The department may, as a matter of right, in order to enforce its rights under this section, *institute*, intervene in, or join any legal proceeding in *its own name* in one or more of the following capacities: [1] *individually*, [2] as subrogee of the recipient, [3] as assignee of the recipient, or [4] as lien holder of the collateral.

§ 409.2665(12), Fla. Stat. (Supp. 1990) (emphases and bracketed numbers added). In addition, the 1990 law provided that:

> Principles of common law and equity as to assignment, lien, and subrogation are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third party resources.

§ 409.2665(1), Fla. Stat. (Supp. 1990).

The statute also provided that "[t]he department is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title *free and clear of latent equities in a third-person*." § 409.2665(7)(b)(2), Fla. Stat. (Supp. 1990) (emphasis added). The 1990 law made it clear that these rights, "as to which the department may assert independent principles of law, . . . shall nevertheless be construed together to provide the greatest recovery from third-party benefits." § 409.2665(7), Fla. Stat. (Supp. 1990). Lest there be any doubt, the 1990 law expressly provided that "[t]he department shall recover the *full amount* of all medical assistance provided by Medicaid on behalf of the recipient to the *full extent* of third-party benefits" and that "[r]ecovery of such benefits shall be collected *directly* from" "[a]ny third party." § 409.2665(8)(a)(1), Fla. Stat. (Supp. 1990) (emphases added).

Thus, under the 1990 statute, never challenged by petitioners, the State had an independent statutory right directly to recover full payment from "any third-party"; a superior statutory subrogation right which placed its claim above all others; a statutorily created assignment right which the State took free and clear of any latent equities in a third person; and a lien right which gave the State a right of 100% recovery from the third party. These four statutorily created rights to recover full benefits were to be asserted in accord with "independent principles of law," which were to be "construed together to provide the greatest recovery." § 409.2665(7), Fla. Stat. (Supp. 1990).

In the decision below, the Florida Supreme Court recognized that "[i]t is clear that the 1990 legislation, *at the very least*, moves the State to the front of the line" vis-a-vis other innocent parties if any potential reimbursement monies become available. Pet. App. 15a (emphasis added).

4. By 1994, mounting Medicaid and other health care expenses in Florida led the state legislature to revisit the question of Medicaid cost recovery. In 1992, 28,350 Floridians died from tobacco-related causes, representing 77 preventable deaths every day or 20% of all deaths in the State.[2] Medicaid costs attributable to smoking in Florida from 1990 to1995 have been estimated at $1.4 billion.[3]

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2 Florida Department of Health and Rehabilitative Services, State Health Office, Family Health Service, *A Florida Health Status Report: Behavioral Risk Factor Surveillance System 1986-1992*, 1994:9-12, *cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No.5, *Tobacco Use in Florida: Consequences and Costs*, p. 442 (September/October 1994).

3 Florida Department of Health and Rehabilitative Services, *Smoking Attributable Mortality, Morbidity, and Economic Costs: 1992 Report*,

The legislative history of the 1994 Amendments reveals that they were the considered product of normal legislative deliberations. There was no effort to "sneak" the amendments into law. For example, the title of the bill containing the amendments provided a full and fair explanation of the provisions dealing with the State's claim for reimbursement against a liable third party:

> [An Act] relating to Medicaid provider fraud; [1] transferring responsibilities for administering the state Medicaid fraud-control program from the Auditor General to the Department of Legal Affairs; [2] creating s. 16.59, F.S. [3] establishing a Medicaid Fraud-Control office in the Department of Legal Affairs; [4] *amending ss. 409.910*, 409.913, F.S.; [5] incorporating conforming revisions [6] *broadening the scope of liability for which Medicaid payments must be repaid;* [7] *expanding causes of action*; [8] *providing for joint and several liability*; [9] *providing a cause of action for the agency*; [10] *deleting limitations on attorney representation*; [11] *allowing agency to consolidate cases into one proceeding*; [12] *defense of statute of repose does not apply to actions by agency brought under this section*; [13] *placing limitations on recipient's right to recover when recipient fails to intervene*; [14] amending s. 409.920; [15] conforming the transfer of duties and providing for assistance from any state attorney or law enforcement agency in

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1994, *cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No. 5, *Tobacco Use in Florida: Consequences and Costs*, p. 442 (September/October 1994).

> investigating and prosecuting Medicaid fraud cases; [16] providing an effective date.

(emphases and bracketed numbers added). The April 7, 1994 Journal of the Senate, page 839, explains the circumstances of the bill's passage in the Senate:

> On a motion by Senator Foreman and by two-thirds vote, CS/CS/SB 2110 as amended was read the third time by title, passed, and ordered engrossed, and then certified to the House. The vote on passage was yeas - 38, nays - none.

The transcript of the tape of the House floor discussion of the bill (CS/CS/SB 2110) evidences dialogue among Representative Wallace (the Speaker of the House of Representatives), its Clerk, and Representative Graber regarding the proposal. Representative Graber explained:

> This is the transfer of the Medicaid Fraud Unit to the Attorney General's Office. It has come back with an amendment that broadens principles of recovery, scope of the State's independent cause of action and the State's ability to consolidate cases.

The Speaker inquired whether they were any "questions to the sponsor." There were none. The rules were waived and CS/SB 2110 was read a third time. The Speaker again inquired whether there were questions on the bill or debate. There were none. The bill passed by a vote of 118 yeas and zero nays.

After petitioners suggested in the Florida courts that the 1994 Amendments had been enacted without full compliance

with state legislative rules, the Secretary of the Senate examined all pertinent records, documents and tapes relating to the passage of the Amendments and certified to the Circuit Court of Leon County that there were no violations of the legislative rules.[4]

5. The Florida Supreme Court explained that, "[a]ssuming that the content of the 1990 Act is open to numerous interpretations, the 1994 amendments clarify the State's cause of action definitively." Pet. App. 15a. The 1994 Amendments make clear that the State's cause of action is not derivative in the nature of a subrogation, assignment, or lien. "Rather, it is a new independent cause of action that requires the State to prove: (1) either negligence or a defective product; (2) causation; and (3) damages." *Id.* at 16a.

The 1994 Amendments restated and expanded the language of the 1990 statute to make clear that affirmative defenses are abrogated to the extent necessary to ensure the State's direct recovery of sums owed to it. § 409.910(1), Fla. Stat. 1995. The 1994 Amendments also clarified that the State has the authority to pursue all related claims in one proceeding, § 409.910(9), Fla. Stat. 1995, and to "proceed to seek recovery based on payments made on behalf of an entire class of recipients," where the number of Medicaid recipients "is so large as to cause it to be impracticable to join or identify each claim." § 409.910(9)(a), Fla. Stat. 1995. The State was also given the power to use statistical evidence and theories of market share and joint and several liability. § 409.910(1), (9),

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4 *See* Letter of Joe Brown, Secretary of the Senate, dated May 24, 1994, Exhibit B to the State's Opposition to Plaintiffs' Motion for Summary Judgment (filed June 14, 1995).

(9)(b), Fla. Stat. 1995. Also, as first expressed in 1990, the 1994 amendments to § 409.910(1) reiterate that common law principles of recovery should be liberally construed to effectuate the purposes of the Act.

6. After passage of the 1994 Amendments, the Governor of Florida announced his intent to recover Medicaid damages from the tobacco industry, and petitioners filed a declaratory judgment action in the Circuit Court of Leon County, Florida. Petitioners initially alleged that the 1994 Amendments were unconstitutional on their face. They subsequently amended their complaint to question the constitutionality of the structure of the Agency for Health Care Administration ("AHCA"), which was initially established in 1992. *See* Ch. 92-93, Laws of Fla. AHCA is the State's primary health care agency with responsibility to manage a $6.5 billion budget and oversee all health care services, including recoupment of Medicaid payments from liable third-parties.

The Circuit Court of Leon County held that the 1994 Amendments, including their abrogation of affirmative defenses, did not violate due process or the right of access to courts under the Florida Constitution. Pet. App. 44a-45a. The court further held that the 1994 Amendments fully complied with the legislative title requirements of the state constitution and were not pre-empted by federal law. *Id.* (Petitioners did not subsequently pursue these issues on appeal.) The court also held that the portions of § 409.910(9) of the Amendments dealing with joinder and identifying injured Medicaid recipients, as well as the portions of §§ 409.910(1) and 409.910(9) dealing with the interpretation of common law theories of recovery and the evidence code, infringed on the power of the judiciary and were invalid under the state constitution. *Id.* at 45a-46a. The court held that the 1994

Amendments could not be applied to conduct or activities that occurred before July 1, 1994 and could not be applied to revive time-barred claims under the Florida statute of repose. *Id.* The court also held that the structure of AHCA violated the Florida Constitution. *Id.* at 46a.

The Florida Supreme Court affirmed in part and reversed in part. The court held that the abrogation of affirmative defenses was not unconstitutional on its face, properly recognizing that "the judicial branch must be cautious when evaluating the choices made by the legislative branch as to the appropriate funding for programs it has deemed important to the public welfare." Pet. App. 2a. "We must avoid unnecessarily limiting the funding options available to the legislature when addressing today's policy problems." *Id.* The court found that the 1990 legislation represented "major amendments" that significantly strengthened the State's power to sue third parties to recover Medicaid costs. *Id.* at 3a. The court explained that the 1994 Amendments merely "clarify the State's cause of action definitively." *Id.* at 15a. The court also noted extensive precedent both from this Court and under the Florida Constitution permitting the state legislature to abrogate affirmative defenses. *Id.* at 18a-23a. The court emphasized that "[n]ot all tort actions carry with them the same elements or affirmative defenses." *Id.* at 32a.

The Florida Supreme Court further held that certain aspects of the 1994 Amendments were invalid under the Florida Constitution: (1) the authority to pursue an action without a mechanism for identifying individual Medicaid recipients; (2) the abolition of a statute-of-repose defense with respect to time-barred claims; and (3) the provision for combining the theories of market share liability and joint and several liability (although the court opined that "either theory may be used separately"). Pet. App. 2a. Finally, the court upheld the

constitutionality of AHCA under the Florida Constitution. *Id.* at 9a-13a.

Petitioners moved for rehearing, repeating many of the same arguments raised here. That motion was denied. Pet. App. 49a.

REASONS FOR DENYING THE WRIT

1. Certiorari should be denied because petitioners' arguments fail to raise an important question of federal law. The 1994 Amendments represent an eminently reasonable solution to pressing fiscal and health care problems confronting the State Medicaid program.

Tobacco companies, through the production, promotion and sale of their products, have knowingly created a massive public health crisis. The State, as guardian of the public health, has acted to meet this crisis through the provision of necessary medical treatment. In fulfilling its duty, the State has assumed a crushing financial burden — a burden which in all equity and fairness should be borne by those whose lucrative enterprise is responsible for the harm. The 1994 Amendments do not represent the radical departure from existing Florida law — or from traditions of common law and equity jurisprudence — that petitioners' claim. Rather, they represent a sound attempt to force tobacco companies and other liable parties to internalize some of the social costs of their tortious behavior.

In fact, Congress itself requires States participating in the Medicaid scheme to seek to collect that money from liable third parties, although the federal government does not prescribe precisely how the State is to do so. The federal Medicaid statute provides in pertinent part:

> [that] a state plan for medical assistance must . . . provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan; and (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25). In adopting the 1994 Amendments, the Florida legislature was acting to implement this congressional mandate.[5]

"[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that do not affect fundamental rights or proceed along suspect lines." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). In particular, a legislature is free to abolish affirmative defenses and create new liabilities without violating due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. California*, 444 U.S. 277, 281-83 (1980). A defendant "has no vested right to have . . . common-law defenses perpetuated for his benefit." *Hawkins v. Bleakly*, 243 U.S. 210, 213 (1917); *see also New York Central Co. v. White*, 243 U. S. 188, 198 (1917) ("No person

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5 The state circuit court in this case ruled that the federal Medicaid statute does not prescribe subrogation as the exclusive means by which a State may recover Medicaid costs and thus does not pre-empt the Florida law in this regard. Pet. App. 45a. Petitioners did not challenge this ruling before the Florida Supreme Court, nor do they raise a pre-emption issue in their petition for certiorari.

has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.") (collecting cases); *Branch v. United States*, 69 F.3d 1571, 1577-58 (Fed. Cir. 1995) ("[A] legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law."), *cert. denied*, 117 S. Ct. 55 (1996).

2. Petitioners complain that it is "'wholly arbitrary and irrational'" to permit the State to abrogate common law defenses in Medicaid cost recovery actions "based solely on the happenstance that the *State* seeks recovery." Pet. 13, 15 (citation omitted and emphasis in original).

At the outset, it is important to note that petitioners are forced to rely on groundless hyperbole and a distortion of both the 1994 Amendments and the history of Florida's legislative efforts to assure full recovery of Medicaid costs from culpable third parties.

a. Petitioners assert that "[i]t as though the State has declared that in football league games, when the State's university team's offense is on the field, the opponent's defense must withdraw to the sidelines." Pet. 11. Petitioners insist that there are "'no significant constraints or protections against arbitrary results'" in the 1994 Amendments. Pet. 14 (citation omitted).

To the contrary: The Florida Supreme Court made clear that the State is required to prove "(1) either negligence or a defective product; (2) causation; and (3) damages." Pet. App. 16a. Further, the court held that defendants have the right "to challenge improper payments" made in the Medicaid program.

Id. at 25a. Statistical evidence may be used by the State only within the bounds of existing procedure and rules of evidence. *Id.* at 30a.

Petitioners utterly fail to demonstrate how these safeguards will prove inadequate to guard against "arbitrary results." Indeed, under petitioners' view, the State of Florida would be on sounder constitutional ground if it eliminated common-law affirmative defenses in *all* litigation involving dangerous or defective products, rather than adopting what petitioners portray as an unprincipled exception for Medicaid cost recovery suits brought by the State. Thus, petitioners' own preferred solution is one that would expose them to even greater liability.

b. Petitioners claim that the 1994 Amendments create a special rule for the State in Medicaid recovery actions. The Florida Supreme Court held that this is not so. The court found that the Amendments "merely treat[] the State as any other faultless plaintiff would already be treated under current Florida law." Pet. App. 32a. The court compared the 1994 Amendments to the existing rule of joint and several liability in Florida, under which a plaintiff may recover all damages from any of multiple defendants even though the particular defendant selected may be the least culpable defendant in the case. *Id.* (citing Fla. Stat. § 768.81(3)). "[T]he Act simply recognizes the State as an entity analogous to the faultless plaintiff above." *Id.* The Amendments allow the State "to collect one hundred percent of the damages from a culpable third party even if another party might be considerably more culpable." *Id.*

Further, petitioners' claim that the 1994 Amendments "worked a monumental change in pre-existing State law" (Pet. 5) is simply unsustainable in light of the 1990 statute. The

1994 Amendments did not introduce the idea of an independent action by the State. They did not make culpable acts that were innocent when undertaken. They merely "clarif[ied]" — in the words of the Florida Supreme Court, Pet. App. 15a — preexisting Florida law to make explicit that potential third-party defendants are liable to the State for Medicaid payments attributable to the harm caused by their dangerous or defective products. It was the 1990 amendments — which petitioners did not challenge below and have not sought to challenge here — that initially created special powers and preferences in favor of the State. Indeed, the 1990 Act encompassed some twelve pages of session law and supplanted section 409.266(4), Florida Statues, a one-page section of the "Medical Assistance" statute. In contrast, the 1994 Amendments, which if stacked on end yield less than two pages, simply fine-tune the 1990 vehicle to make it more efficient in carrying out the federal and state policy of full recovery from all liable third-party sources.

Accordingly, the entire premise of petitioners' argument is simply incorrect.

3. In any event, even if the 1994 Amendments *had* created the special rule that petitioners claim, the Florida legislature could reasonably have found that there are important differences between Medicaid cost recovery suits by the State and private litigation.

States are not similarly situated to individual users of the dangerous or defective products in question. States did not assume any of the risks of tobacco: they did not inhale.

When a tobacco company sells its products to consumers, it is foreseeable that many will become ill and that the State will thereupon be called upon to pay a portion of the resulting medical costs. The State is an innocent third party that has

been forced to pay enormous sums which should in equity have been borne by the tortfeasors. Whether an individual smoker has assumed the risk of smoking is simply immaterial to the tobacco company's liability to the *State*. States are not participants in the enterprise that has caused them, collectively, to incur billions of dollars in health care costs. They have instead been compelled unfairly to subsidize the externalities of tortfeasors' activities, to the great detriment of state taxpayers, citizens, and businesses. As between wrongdoers and the State, the former should bear the cost of the injuries attributable to their tortious activities

Nor is the State comparable to a private insurance company:

> [T]he relationship between a hospital receiving reimbursement under Medicaid or Medicare and the government is not analogous to an insurance contract. Medicare and Medicaid are not funded by beneficiaries' premium payments, but by a payroll tax. This is not the form of conventional insurance.

United States v. University Hospital, 575 F. Supp. 607, 613 (E.D.N.Y. 1983). Unlike an insurer, the State does not make a profit from its medical assistance. It exercises its sovereign authority to tax the citizenry and expend such funds for the benefit of all of its citizens. In addition, the State has the right through its quasi-sovereign authority to pursue a cause of action against a wrongdoer who by its action does damage to "a set of interests that the State has in the well-being of its populace." *Alfred L. Snapp & Son, Inc., v. Puerto Rico*, 458 U.S. 592, 602 (1982). Obviously, an insurance company has no such responsibility to the public welfare.

The caselaw reflects these vital distinctions. If insurance is provided by contract, where a risk is assumed for a fee or premium, the insurer may be entitled only to be subrogated to the claims of the insured. The remedy is entirely different, however, when the "insurer's" obligation is imposed by law or statute. In that case, the insurer is entitled to the equitable remedies asserted by the plaintiff here, which are broader than subrogation. As one court explained:

> [S]ince the insurer's obligation to pay is due solely to its *contract*, it presumably received consideration for agreeing to bear the risk; allowing indemnity gives the insurer a windfall. Implied indemnity is not intended for such persons. As a general rule, "[t]he right to indemnity inures to a person who, without active fault on his part, is compelled *by reason of legal obligation* or relationship to pay damages which have been caused by the acts of another."

Industrial Risk Insurers v. Creole Production Serv., 746 F.2d 526, 528 (9th Cir. 1984) (emphasis added and citation omitted); *see also Great American Ins. Co. v. United States*, 575 F.2d 1031, 1034-35 (2d Cir. 1978) ("Appellant here has confused the principle of indemnity which underlies subrogation with an implied action for indemnification — which is completely distinguishable. . . . The insurance carrier's relationship with his insured is not one imposed by operation of law or statute; it is a contractual relationship in which the carrier has deliberately accepted a risk for a fee.").

Indeed, the differences between the State and private litigants are so apparent that a Mississippi court has held that, *even in the absence of a statute* like the one enacted in Florida, a State is not a subrogee and is not subject to the affirmative

defenses that might be asserted against individual smokers in product liability actions. Order of Feb. 21, 1995, *Moore ex rel Mississippi v. The American Tobacco Co.*, No. 94:1429 (Ch. Ct., Jackson Co., Miss.).

4. Congress has made the same policy judgment as the Florida legislature. The Medical Care Recovery Act, 42 U.S.C. § 2651, enables the United States Government to seek reimbursement for medical costs incurred by federal agencies, without being subject to all of the affirmative defenses that a subrogee would face. The Act provides in relevant part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished. . . The United States may, to enforce such a right, (1) intervene or join any action or proceeding brought by the injured or diseased person . . . against the third person who is liable for the injury or disease; or (2) . . . *institute and prosecute legal proceedings against the third person* in state or federal court, *either alone* (in its own name or in the name of the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors) *or in conjunction with the injured or diseased person*, his guardian, personal representative, estate, dependents, or survivors.

(emphasis added). Under the Act, the federal government may assert a direct action for reimbursement without being bound by affirmative defenses that might preclude suit by the individual injured victim. *See, e.g., Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 419 (D.C. Cir. 1994) (noting that the "government's independent right of action entitles it to full recovery even where [the] tort victim's right would be limited by comparative negligence"); *Holbrook v. Anderson Corp.*, 996 F.2d 1339, 1341 (1st Cir. 1993) (government has "an independent right of recovery against the tortfeasor" and "is not defeated even by certain restrictions that might bar the injured person's own recovery"); *United States v. Theriaque*, 674 F. Supp. 395, 398 (D. Mass. 1987) (government is not merely a subrogee in suits brought under the Medical Care Recovery Act, but has an independent right to sue the tortfeasor); *see also United States v. Gera*, 409 F.2d 117, 119-20 (3d Cir. 1969); *United States v. Merrigan*, 389 F.2d 21, 22 (3d Cir. 1968); *United States v. Hunter*, 645 F. Supp. 758, 759 (N.D.N.Y. 1986); *United States v. Moore*, 311 F. Supp. 984, 985 (D. Pa. 1970), *rev'd on other grounds*, 469 F.2d 788 (3d Cir. 1972).

5. In fact, there are many instances in the law where parties akin to the State here are able to sue in indemnity, for restitution, or on similar equitable or legal grounds without being subject to otherwise applicable affirmative defenses. Far from being arbitrary or even very unusual, the 1994 Amendments simply apply these altogether familiar principles in a context where the State is suing as an innocent party wrongfully forced to bear Medicaid costs that it seeks to prove are in fact attributable to culpable tortfeasors.

For example, many workers' compensation statutes do not bar third party actions for implied indemnity. That is, when an

injured employee brings a tort suit against the manufacturer of a defective product that caused the on-the-job injury, the fact that the employee's action against the employer is barred by a workers' compensation Act does not preclude the manufacturer's third-party action against the employer for indemnification.[6] Similarly, many courts have allowed third-party actions against tortfeasors protected from a first-party suit by interspousal or intrafamilial immunity.[7] Further, third-party indemnity actions are not precluded by the expiration of the injured party's statute of limitations against the defendant, indicating that the indemnity action does not depend upon the viability of the originally injured party's claim.[8] And direct actions by third parties have been allowed in many other contexts despite the existence of affirmative defense that would preclude the tortfeasor's immediate victim from bringing suit successfully.[9]

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6 *E.g., Oaklawn Jockey Club, Inc. v. Pickens-Bond Construction Co.*, 477 S.W.2d 477, 478 (Ark. 1972); *Trail Builders Supply Co. v. Reagan*, 235 So.2d 482, 485 (Fla. 1970); *Skinner v. Reed-Prentice Division Package Mach. Co.*, 374 N.E.2d 437, 443 (Ill. 1977); *Miller v. De Witt*, 226 N.E.2d 630, 640 (Ill. 1967); *Ashland Oil and Refining Co. v. General Telephone Co.*, 462 S.W.2d 190, 193-94 (Ky. Ct. App. 1970); *Dale v. Whiteman*, 202 N.W.2d 797, 800-02 (Mich. 1972); *Sommer v. Federal Signal Corp.*, 593 N.E.2d 1365, 1373-74 (N.Y. 1992).

7 *Joseph v. Quest*, 414 So.2d 1063, 1064-65 (Fla. 1982); *Shor v. Paoli*, 353 So.2d 825, 826 (Fla. 1978); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 174 So.2d 122, 125 (La. 1965); *Zarrella v. Miller*, 217 A.2d 673, 675 (R.I. 1966); *Bishop v. Nielsen*, 632 P.2d 864, 866 (Utah 1981).

8 *See When Statute of Limitations Commences to Run Against Claim For Contribution or Indemnity Based on Tort*, 57 A.L.R. 3d 867, 881-884 (1996).

9 *E.g., Westchester Light Company* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 180, 15 N.E.2d 567, 568 (N.Y. 1938) ("Recovery

6. Petitioners' legal authorities are inapposite. Petitioners rely primarily on cases involving contract to which governments are parties. Pet. 11-12 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *United States v. Winstar*, 116 S. Ct. 2432, 2465 (1996)). These cases are irrelevant here, for the State is not seeking to interpret a contract it has drafted, nor is it attempting to breach a contract with petitioners. The Contract Clause does not limit the State's police power in this context.[10]

("Recovery over against the employer in an unusual case like this need not be rested upon any theory of subrogation. An independent duty or obligation owed by the employer to the third party is a sufficient basis for the action."); *Jones v. Kinney*, 113 F. Supp. 923, 924-25 (W.D.Mo. 1953) (wife could maintain lawsuit against husband's employer, and employer could maintain third-party action against husband, despite rule preventing spouses from suing one another in tort).

10 "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U.S. 473, 480 (1905); *see also General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) (upholding retroactive change in workers' compensation law because employers "knew that they were taking a risk in reducing benefits . . . , but they took their chances"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (upholding imposition of oil and gas severance tax specifying that producers could not pass on tax directly or indirectly to consumers, regardless of what private contracts provided).

The general principle of "self-dealing" that petitioners seek to extract from the contract cases (Pet. 14) is not sustainable in light of the many special powers enjoyed by the States, including sovereign immunity, eminent domain, and the authority to raise revenue. The exercise of any of these powers has never been thought to trigger "heightened scrutiny."

7. Review should also be denied because petitioners have brought a facial challenge to the Amendments. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987).

This burden cannot be met here. At most, petitioners have identified only the possibility of abuse in particular instances in which the statute might be applied. In the decision below, the Florida Supreme Court explicitly and repeatedly recognized that any constitutional difficulties presented by the 1994 Amendments could be addressed on a case-by-case basis in litigation brought by the State to recover Medicaid costs. *See* Pet. App. 2a ("a ruling of facial constitutionality does not preclude a later action challenging the manner in which the Act is applied"); *id.* at 18a ("any such [due process] problems will arise in the application of the Act's provisions. We are not currently faced with that issue. On its face, the provision allowing for the abrogation of affirmative defenses is constitutional under both the federal and Florida constitutions."); *id.* at 23a ("we rule that the Act's abrogation of affirmative defenses is facially constitutional. We emphasize, however, that Florida courts will remain free to hear challenges to the actual application of such abrogation.");

id. at 24a-25a ("To recap, we hold that the provision abrogating affirmative defenses is facially constitutional. We do not address whether the provision will always survive a constitutional due process attack as to its application. It would be inappropriate to speculate as to such application. . . . Further, any speculation as to the application of this provision would be flawed because we have no record containing facts, evidence, or expert opinions.").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 96-915

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ASSOCIATED INDUSTRIES OF FLORIDA, INC. and PHILIP MORRIS, INC.,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AND STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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February 18, 1997

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[1] Petitioners' Rule 29.6 listing of all parent companies and nonwholly owned subsidiaries is located at pages iii-iv of the Petition for Writ of Certiorari.

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Nothing in the opposition brief of Respondents (the "State") undercuts the significance of the fundamental constitutional issues at stake. The naked aim of the statute is an arbitrary sweep of billions of dollars from private parties into the State treasury. As noted by the three dissenting justices below, the statute eradicates affirmative defenses in all actions the State chooses to bring against any manufacturers whose products allegedly cause injuries resulting in Medicaid expenditures. Indeed, the State is currently pursuing such a multibillion dollar Medicaid reimbursement lawsuit against tobacco defendants.

The statute raises important due process issues that should be resolved by this Court. May a state abrogate common law defenses solely for its own litigation benefit? May a state, by fiat, transform worthless or nonexistent claims of Medicaid recipients into valuable state "reimbursement" claims?

Respondents fail to cite a *single* case where such special interest legislation designed to ensure a state's own victory against civil litigants has been sustained against constitutional attack. Instead, the bulk of the brief is devoted to an irrelevant rehashing of an argument that the State lost below concerning the pre-1994 meaning of the Florida Act (*i.e.*, before adoption of the Amendments challenged in this Petition). The State also recites various statutes and common law theories that it contends somehow excuse the State's blatant self-dealing. None of those cases—which do not even purport to discuss the constitutional issues central to this Petition—are even remotely similar to the Amendments. In sum, this Court should grant certiorari to examine and strike down the State's arbitrary, self-interested legislation.

I. THE STATE'S ARGUMENTS CONCERNING THE SCOPE OF THE 1990 AMENDMENTS ARE IRRELEVANT TO THIS PETITION, WHICH CHALLENGES THE 1994 AMENDMENTS, AND PROVIDE NO BASIS FOR DENYING CERTIORARI

The State fails to meet head-on Petitioners' constitutional challenge to its blatant self-dealing legislation. Much of the

Respondents' opposition brief presses an argument concerning the interpretation of the Florida Act that was rejected by the court below. (Opp'n at 1-10, 14-15, 19-20.) These arguments are irrelevant to whether Petitioners have presented an appropriate question for this Court to review.

After considering these same arguments, the Florida Supreme Court ruled that the 1994 Amendments created a new right of action on behalf of the State, including abrogation of affirmative defenses, that did not exist prior to 1994.[2] Even apart from the fact that the State's argument is wrong, it is difficult to see how the effective date has anything to do with Petitioners' challenge to the facial constitutionality of the Act or the appropriateness of certiorari.

II. THE AUTHORITIES RELIED UPON IN THE OPPOSITION FAIL TO SUPPORT THE CONSTITUTIONALITY OF THE AMENDMENTS

The State fails to cite a single case in which this Court or any other court has ever upheld as constitutional the sort of self-dealing central to the 1994 Amendments. Rather, it argues that the Amendments do *not* in fact establish special rules applicable only to the State, and strains to find analogies in statutes or common law doctrines irrelevant to the constitutional issues. The bottom line is that the legislation is an unprecedented example of governmental self-dealing and its propriety should be considered by this Court.

A. Respondents Fail To Distinguish Petitioners' Authorities

The Petition draws support from this Court's due process decisions for the proposition that the State may not arbitrarily

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[2] Rejecting the same arguments advanced here, the Florida Supreme Court found that the State could "proceed independently with its new cause of action" as to "payments made after the effective date of the 1994 Act," but that its cause of action prior to that date was limited to the "traditional subrogation action." (30a) The 1990 Amendments were designed to give the State priority over other creditors but, unlike the 1994 Amendments, did not alter the rules governing the liability of third parties.

abrogate affirmative defenses. Additional decisions arising from a number of constitutional provisions show that self-dealing by the State is subject to close scrutiny. By contrast, the State can find no support from this Court's precedents to support its self-serving abrogation of defenses.[3]

Nor can the State distinguish the authorities demonstrating the unconstitutionality of its arbitrary action. The State pretends that the only cases relied upon by Petitioners arose under the Contract Clause. (Opp'n at 21-22.) To the contrary, various decisions based on the Due Process Clause (Pet. at 12-14), the Excessive Fines Clause (Pet. at 12) and other provisions, including the Contract Clause, all confirm that state self-help remedies are subject to rigorous scrutiny. Nor are the Contract Clause cases so easily dismissed: the State's "reimbursement" action—which involves collection of money, not regulation—is more akin to a contractual remedy than any exercise of the "police power." (Opp'n at 21 n.10.)[4]

B. The Amendments Establish a Special, and Arbitrary, Rule in Favor of the State

The State argues that the statute does *not* in fact establish special rules applicable only to the State. (Opp'n at 14-15, 19-20.) That argument blinks at reality. If it were really so, the

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[3] The few cases relied upon by the State that concern constitutional issues are not pertinent. Even if it were true, the fact that, under some circumstances, "a legislature is free to abolish affirmative defenses and create new liabilities without violating due process," (Opp'n at 12), does not stand for the proposition that the State may create different (and more favorable) rules for itself than for any other litigant. On the contrary, the authorities cited by the State recognize that abrogation of defenses is unconstitutional if it is "arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980).

[4] Given the "line [that] has to be drawn . . . between regulatory legislation that is relatively free of government self interest . . . [and] statutes tainted by a governmental object of self-relief," *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2465 (1996), it is quite evident on what side of the line the Florida statute falls. As one prominent commentator has noted, "the Court seems correct in stressing the heightened 'need for judicial oversight when the State's self-interest is at stake . . .' " Laurence H. Tribe, *American Constitutional Law*, § 9-11, at 620 (2d Ed. 1988).

Florida Legislature need not have bothered to pass the Amendments creating the new cause of action. Plainly, Florida law does not generally permit a volunteer to bypass affirmative defenses by providing assistance to an injured party and then suing those allegedly responsible for the injury.[5]

Indeed, a Florida court applying the Supreme Court's ruling has already rejected such novel common law theories as applied to State reimbursement lawsuits. *State of Florida* v. *American Tobacco Co.*, No. CL95-1466AH (Fla. Cir. Ct., 15th Jud. Cir. Sept. 16, 1996) (order dismissing common law damage claims in tobacco Medicaid reimbursement lawsuit). Thus, the State's reliance upon various common law and statutory remedies supposedly exempting "innocent third parties" from affirmative defenses is inapposite. Such theories plainly do not support the State of Florida's ability to pursue the claims covered by the Act.

More fundamentally, the State's untested claim of "faultlessness" simply illustrates the constitutional infirmity of the Amendments. Under the State's interpretation (Opp'n at 14), the Amendments declare it "faultless" by fiat, notwithstanding the State's actual conduct, including, for example, the massive excise tax revenues it has long derived from the sale of tobacco products. By arguing that the Amendments abrogate *all* affirmative defenses—whether derivative or direct—the State would thus create an *irrebuttable presumption* of faultlessness for both itself and the recipients on whose behalf it makes Medicaid payments. Such "[a] statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause." *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929).

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[5] Any implication that the federal Medicaid statute supports this self-help legislation (Opp'n at 2) is frivolous. Federal law makes clear that Congress expected states to fulfill their obligations to "seek reimbursement" from third parties by way of traditional subrogation actions. 42 U.S.C. § 1396a(a)(25) (1994); 42 C.F.R. §§ 433.137(a), 433.145-46(a) (1996).

The State can articulate no reasoned basis for treating its own Medicaid reimbursement lawsuits differently from typical insurance subrogation actions. The only justification identified in the decision below or the opposition brief is the State's desire to create a new "funding option." (Opp'n at 10, 16.) Of course the mere desire to increase State revenues is a limitless and unprincipled justification; that desire is customarily satisfied through the taxing power, rather than manipulation of the laws governing civil liability. (Pet. at 13.) Likewise, any suggestion that the State may abolish affirmative defenses because an obligation to pay Medicaid expenses is "imposed by law or statute," (Opp'n at 17), ignores the State's voluntary participation in Medicaid. In any event, the courts have repeatedly held that the negligence of the injured party *is* a defense to an indemnification action by a person statutorily obligated to pay the injured person's expenses.[6]

The additional common law authorities cited in the opposition brief bear no relation to the State's claims. The indemnity and restitution cases (Opp'n at 19-20) involved neither self-dealing by a state nor any constitutional analysis at all. Moreover, even the few jurisdictions which hold that certain personal "defenses," such as spousal immunity, do not apply to indemnity claims, *unanimously* hold that the fault of the injured party is a valid defense against such claims.[7]

The Worker's Compensation cases (Opp'n at 20) merely limit the scope of employers' statutory immunity from suit, holding that the statutes do not overcome the common law

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[6] *See, e.g., Brandt* v. *Phillips Petroleum Co.*, 511 So.2d 1070, 1072-73 (Fla. Dist. Ct. App. 1987) (reducing employer's recovery of workmen's compensation benefits from third-party by employee's comparative negligence); *Finney* v. *Manpower, Inc.*, 177 Cal. Rptr. 74 (Cal. Ct. App. 1981); *Regal Steel, Inc.* v. *Farmington Ready Mix, Inc.*, 414 A.2d 816 (Conn. Super. Ct. 1980).

[7] *Compare City of Coral Gables* v. *Prats*, 502 So. 2d 969, 972 (Fla. Dist. Ct. App. 1987) (reducing plaintiff's loss of consortium award against third party tortfeasor because of spouse's comparative negligence) *with Joseph* v. *Quest*, 414 So. 2d 1063, 1064-65 (Fla. 1982) (cited at Opp'n 20 n.7); *see also Crane* v. *Exxon Corp.*, 613 So. 2d 214, 227 (La. Ct. App. 1992); *Filosa* v. *Courtois Sand & Gravel Co.*, 590 A.2d 100, 102-04 (R.I. 1991).

rule that third party tortfeasors liable to injured employees can obtain indemnity from negligent employers.[8] In such cases, both parties would be liable to the employee under traditional legal principles. Thus, these cases have nothing to do with this case, in which the State seeks to create liability where none previously existed based solely on the State's subsequent payment of Medicaid benefits. Moreover, as with other indemnity claims, contributory (or comparative) negligence of the employee continues to be a defense in such indemnification actions.[9] More fundamentally, none of these cases make the availability of a defense turn on whether suit has been initiated by the state for its own benefit.

The State's reference to the law of joint and several liability is particularly puzzling. It overlooks the elementary point that the putative "least culpable defendant" required to pay an entire judgment has a right to secure contribution from joint tortfeasors. Under the statute, however, a manufacturer is provided no such right against a culpable Medicaid recipient.[10] Nor is the State's claim for *reimbursement* for Medicaid payments to negligent recipients even remotely comparable to a private party's *damage* claim against joint tortfeasors.

C. There Is No Justification for the State's Special Dealing on Its Own Behalf

As noted, the only justification identified by the State to support its self-dealing—its desire to increase revenues—is

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[8] Moreover, the "great majority" of jurisdictions reject the position relied upon by the State. Arthur Larson, 2B *Workmen's Compensation Law* §§ 76.20, 76.81 (1996) (over 30 states prohibit such indemnity suits against employers).

[9] *See, e.g., J. J. Simmons Co.* v. *Firestone Tire & Rubber Co.*, 108 Ill. 2d 106, 483 N.E.2d 273, 278 (1985); *Regal Steel, Inc.* v. *Farmington Ready Mix, Inc.*, 414 A.2d 816 (Conn. Super. Ct. 1980).

[10] A Florida tort defendant subject to joint and several liability may join other alleged tortfeasors as defendants. Fla. R. Civ. P. 1.180. The Amendments, by contrast, expressly *forbid* participation by individual Medicaid recipients in omnibus actions brought by the State. Moreover, Florida has repealed the law of joint and several liability with respect to most noneconomic injuries. Fla. Stat. § 768.81(3).

arbitrary as a matter of law. Likewise, the State's contention that the police power, the power to tax, and the power of eminent domain support a generalized principle of unfettered state power to legislate in its own favor (Opp'n at 21-22) proves too much. This case involves neither the police power (the State is not regulating cigarettes or any other product but merely collecting "reimbursement"); nor the taxing power (rather than exercise the taxing power, the State violates due process by disguising a *de facto* tax in the garb of a lawsuit); nor the power of eminent domain (assuming that the abrogation of defenses is a taking for a "public purpose," the State makes no pretense of providing "just compensation"). If anything, the existence of these discrete, but inapplicable, state powers weighs heavily *against* an implied generalized power to act arbitrarily in self interest.

To the extent that the State attempts to justify its statute with baseless rhetoric against tobacco companies (Opp'n at 11), it ignores the fact that nothing in the Act limits it to tobacco industry cases. On its face, the Act permits the State to obtain reimbursement from *any* "liable third party"—irrespective of the industry involved. In any event, the State's emotional appeal is legally irrelevant: the statute would be equally unconstitutional even if it were limited to tobacco reimbursement cases. And any implicit promise that the statute will be selectively enforced is hardly a defense of its constitutionality.

Nor do the cases involving the Federal Medical Care Recovery Act, 42 U.S.C. § 2651 (1994), support the State's position. Contrary to the State's suggestion (Opp'n at 19-20), the weight of authority is that defenses such as contributory negligence *can* be asserted by an alleged tortfeasor against the government. *See, e.g., United States* v. *Housing Auth. of Bremerton*, 415 F.2d 239, 243 (9th Cir. 1969) ("Where the injured party is himself negligent, and where under state law that contributory negligence absolves the third person from liability, then the United States cannot recover from that third

person.").[11] Indeed, Respondents omit from their quotation of the federal statute that language which establishes that the government's independent right of recovery "is 'subrogated' to the extent that it is subject to any substantive state defenses which would negate the requirement that the injury arise 'under circumstances creating a tort liability upon some third person.' " *United States* v. *Fort Benning Rifle & Pistol Club,* 387 F.2d 884, 887 (5th Cir. 1967) (quoting Medical Care Recovery Act). Furthermore, none of the Medical Care Recovery Act cases addresses the constitutional implications of abrogating affirmative defenses in favor of a state.

III. REVIEW OF THE PETITION IS IMPORTANT TO RESOLVE AN IMPORTANT ISSUE OF FEDERAL LAW

The issue raised by the Petition has never been definitively addressed or resolved by this Court. However, as noted in the Petition, substantial authority interpreting the Due Process Clause, supported by analogous authority under the Contract Clause and other constitutional provisions, demonstrates that such self-dealing is unconstitutionally arbitrary. One can imagine no better case than this one for reaffirming this basic due process principle. Here the State, by fiat, contends that it may insulate itself—and itself alone—from all possible affirmative defenses from all possible defendants whenever the allegedly injured parties' medical bills were paid by Medicaid. As the dissent below noted:

> A law that presumes to measure the liability of a party based on such a consideration is completely arbitrary and violates due process. Whether a claim is Medicaid-eligible has no more relevance in measuring

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[11] The appeals court decision which Respondents cite for a contrary position—*Health Ass'n of Am., Inc.* v. *Shalala,* 23 F.3d 412, 419 (D.C. Cir. 1994)—did not even concern the Medical Care Recovery Act and was merely characterizing a district court decision. That district court decision recognized that its holding was in conflict with the only Court of Appeals decision to have addressed the issue. *United States* v. *Theriaque,* 674 F. Supp. 395, 400 n.5 (D. Mass. 1987).

> whether a party may raise an affirmative defense than the question of whether [the injured party] has brown or blonde hair.

(38a).

As a final note, the State asserts that "[r]eview should also be denied because petitioners have brought a facial challenge to the Amendments." (Opp'n at 22.) The difference between "facial" and "as applied" is ephemeral in this case. Respondents fail to suggest a single scenario in which the Amendments could be applied consistent with due process. In fact, there is no set of circumstances under which the Amendments are valid. Furthermore, there is no rule prohibiting review of facially unconstitutional statutes. *See, e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 514 (1964) (striking down as unconstitutional on its face a statute violating the Fifth Amendment). Indeed, the two cases cited by the State (Opp'n at 22) *granted* review to consider the facial constitutionality of the statutes at issue.

CONCLUSION

For these reasons, and the reasons discussed in the Petition, the petition for writ of certiorari should be granted.

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